



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

2 March 2012 *

(State aid — Financial sector — Aid designed to remedy a serious disturbance in the economy of a Member State — Capital injection with repayment or share conversion options conferred on the aid recipient — Amendment to the repayment terms during the administrative procedure — Decision declaring the aid compatible with the common market — Concept of State aid — Advantage — Private investor test — Necessary and proportionate relationship between the amount of aid and the extent of measures intended to ensure compatibility of the aid)

In Cases T-29/10 and T-33/10,

Kingdom of the Netherlands, represented by C. Wissels, Y. de Vries and M. de Ree, acting as Agents, assisted by P. Glazener, lawyer,

applicant in Case T-29/10,

ING Groep NV, established in Amsterdam (Netherlands), represented initially by O. Brouwer, M. Knapen and J. Blockx, lawyers, and subsequently by O. Brouwer, J. Blockx and M. O'Regan, Solicitor,

applicant in Case T-33/10,

supported by

De Nederlandsche Bank NV, established in Amsterdam (Netherlands), represented initially by B. Nijs and G. van der Klis, subsequently by G. van der Klis, M. Petite and S. Verschuur and, lastly, by M. Petite and S. Verschuur, lawyers,

v

European Commission, represented by H. van Vliet, L. Flynn and S. Noë, acting as Agents,

defendant,

APPLICATIONS for the partial annulment of Commission Decision 2010/608/EC of 18 November 2009 on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan (OJ 2010 L 274, p. 139),

THE GENERAL COURT (First Chamber),

composed of J. Azizi, President, S. Frimodt Nielsen (Rapporteur) and H. Kanninen, Judges,

Registrar: J. Plingers, Administrator,

* Language of the case: English and Dutch.

having regard to the written procedure and further to the hearing on 12 July 2011,
gives the following

Judgment

Background to the dispute

- 1 The applicant in Case T-33/10, ING Groep NV ('ING'), is a financial institution with its registered office in Amsterdam (Netherlands) which offers banking, investment, life assurance and retirement services to private, corporate and institutional clients in over 40 countries. ING is composed of two main legal entities, namely ING Bank NV ('ING Bank') and ING Verzekeringen NV ('ING Insurance'). At the end of 2008, ING's consolidated balance sheet totalled EUR 1 332 billion, more than 75% of which was attributable to its banking activities (recital 12 in the preamble to Decision 2010/608/EC of 18 November 2009 on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING's Illiquid Assets Back Facility and Restructuring Plan (OJ 2010 L 274, p. 139)) ('the contested decision').
- 2 The following steps are required in order to understand the present dispute: first, the various aid measures granted to ING by the Kingdom of the Netherlands in order to remedy a serious disturbance in the economy of that country as a result of the global financial crisis must be presented; second, the main chronological stages of the administrative procedure initiated by the European Commission, with regard to those measures, must be noted; and, third, the content of the contested decision, particularly as regards the factors most relevant to the present actions, must be outlined.

1. Aid measures granted to ING

- 3 It is apparent from paragraph 2.3 of the contested decision that ING has benefited from three aid measures from the Kingdom of the Netherlands, that is to say a capital injection ('the first aid measure' or 'capital injection'), an impaired assets measure ('the second aid measure' or 'impaired assets measure'), also known as the 'illiquid assets' back-up facility, and a number of guarantees given on medium-term liabilities ('the third aid measure').
- 4 The first aid measure consisted of an increase in capital undertaken on 11 November 2008, through the creation of one billion ING securities, without voting rights or dividend entitlement and which were fully subscribed by the Kingdom of the Netherlands, at an issue price of EUR 10 per security. That measure allowed ING to increase its so-called 'Core Tier 1' (category 1) base capital by EUR 10 billion. Under the repayment terms set out in the agreement on subscription of capital concluded in that regard between the Kingdom of the Netherlands and ING, the securities were, on ING's initiative, either to be repurchased at EUR 15 per security (representing a 50% redemption premium compared with the issue price), or, after three years, converted into ordinary shares. If ING chose the conversion option, the Netherlands authorities would, however, have the choice of opting for the alternative redemption of the ING securities at a unit price of EUR 10, plus accrued interest. A coupon on the securities would be paid to the Kingdom of the Netherlands only if a dividend was paid by ING on the ordinary shares.
- 5 The Kingdom of the Netherlands and ING thereafter amended the repayment terms in relation to part of the capital injection. The new terms provided that ING may repurchase up to 50% of the securities at their issue price, plus the accrued interest in relation to the annual coupon of 8.5% and an early redemption premium (also known as an 'early redemption penalty') if ING's share price traded above EUR 10. That premium could reach a maximum amount of EUR 705 million, with the minimum amount being EUR 340 million, ensuring a minimum internal rate of return of 15%.

- 6 On 21 December 2009, ING repurchased 50% of its securities created by the increase in capital of 11 November 2008, at an amount corresponding to their issue price, plus a coupon of 8.5% and an early redemption premium close to the floor amount, so that the total return received by the Kingdom of the Netherlands from the date of their issue was equivalent to the minimal internal rate of return of 15%. Repayment and conversion options on the remaining securities created by that increase in capital remained unaltered.
- 7 The second aid measure consisted of an exchange of cash flows applied to the impaired assets in relation to the 'Alt-A' portfolio of residential mortgage-backed securities granted in the United States, the value of which had declined significantly.
- 8 The third aid measure consisted of guarantees given on ING liabilities amounting to USD 9 billion (of which USD 8.25 billion had already been issued) and to EUR 5 billion (of which EUR 4.15 billion had already been issued). Those guarantees were granted by the Kingdom of the Netherlands in return for a fee.

2. Administrative procedure regarding those aid measures

- 9 On 22 October 2008, the Kingdom of the Netherlands notified the Commission of the first aid measure (Case N 528/08).
- 10 On 12 November 2008, the Commission adopted Decision C (2008) 6936, in Case N 528/08, on State aid granted by the Kingdom of the Netherlands to ING ('the initial decision'). In that decision, the Commission found — following an analysis taking into account 'public policy considerations, taken together with the needs of ING' on which the Netherlands State's intervention was based, and 'other considerations ... which no private investor would consider' — that the purchase by the Netherlands State of ING securities contained an element of aid within the meaning of Article 87(1) EC (recitals 36 to 51 in the preamble to the initial decision). However, the Commission observed that that measure was compatible with the common market within the meaning of Article 87(3)(b) EC, in so far as it sought to remedy a serious disturbance in the economy of a Member State as a result of the global financial crisis (recitals 52 to 70 in the preamble to the initial decision). Consequently, the Commission raised no objections to the measure and approved it as an emergency measure, in the light of the financial crisis, for a period of six months. It also stated that, at the end of that six-month period, the measure would be reviewed, in particular as regards the manner in which ING's long-term viability was to be ensured. Lastly, the Commission pointed out that, if the Netherlands authorities submitted, within that six-month period, a viable plan in that regard ('the restructuring plan'), the validity of the initial decision would automatically be extended until it adopted a decision on the plan (recitals 71 to 74 in the preamble to the initial decision).
- 11 On 4 March 2009, the Kingdom of the Netherlands notified the Commission of the second aid measure (Case C 10/09, ex N 138/09).
- 12 On 17 March 2009, a meeting was held between the Commission, the Kingdom of the Netherlands, ING and De Nederlandsche Bank NV ('DNB'), the central bank of the Netherlands, which is also the banking and insurance supervisory authority of the Netherlands. At that meeting, the Commission stated, inter alia, that it considered that a restructuring plan of considerable scope would be needed in order for it to authorise definitively the capital injection measure and the impaired assets measure.
- 13 By letter of 31 March 2009, the Commission notified the Kingdom of the Netherlands of its decision to initiate the procedure laid down in Article 88(2) EC (OJ 2009 C 158, p. 13) ('the opening decision') because of its doubts as to the compatibility of certain aspects of the impaired assets measure with the Commission's Communication on the treatment of impaired assets in the Community banking sector (OJ 2009 C 72, p. 1). That measure was, however, approved for a period of six months

(paragraph VI of the opening decision). It is also stated, in the opening decision, that the Netherlands State had undertaken to submit a restructuring plan covering both the capital injection and impaired assets measures by 12 May 2009 at the latest (recital 83 in the preamble to the initial decision).

- 14 On 24 April 2009, a meeting was held between the Commission, the Kingdom of the Netherlands, ING and DNB. At that meeting, the Commission stated that the aid measures referred to in paragraph 3 of this judgment would not be approved if ING was not willing to accept significant restructuring measures in order to restore its viability and to mitigate the resulting distortions of competition ('compensatory measures'). In particular, the Commission considered that ING would have to accept a ban on acquisitions, a price leadership commitment and asset divestments going beyond those envisaged by ING, including its interests in three entities: a bank active in the Netherlands, an entity active in the United States and an entity active in Europe.
- 15 On 12 May 2009, the Kingdom of the Netherlands sent the Commission a restructuring plan for ING. That plan was structured in accordance with an outline communicated by the Commission on 2 April 2009 and included an ING proposal to reduce its balance sheet value by an amount deemed significant in relation to its total value recorded on 30 September 2008. Additional compensatory measures were not considered necessary by ING in so far as it believed that the aid measures referred to in paragraph 3 above did not result in any identifiable distortions of competition. That restructuring plan was supplemented by additional information submitted on 7 July 2009. At the same time, ING provided detailed arguments to substantiate its claim that there were no distortions of competition.
- 16 On 14 July 2009, the first meeting was held between the Commission, the Kingdom of the Netherlands, ING and DNB to discuss the restructuring plan submitted on 12 May 2009. The Commission opened the meeting by presenting the elements it considered necessary for the adoption of that plan. In its presentation, entitled 'Restructuring Framework for ING Group – Kick-off presentation', the Commission stated, *inter alia*, as follows: first, that the plan was not credible; second, that without approval of the plan by the Commission services, the capital injection and impaired assets measures would have to be regarded as unlawful aid that must be recovered; and third, that such approval would have to be given by mid-August 2009 at the latest so that a final decision could be taken by the end of September 2009. The Commission also used the presentation to provide, under the heading 'Cornerstones of restructuring framework are set', a comprehensive overview of the compensatory measures it considered necessary. The compensatory measures called for by the Commission included a complete prohibition on acquisitions, a price leadership prohibition in the retail banking sector in the Netherlands, and significant divestments of assets in the Netherlands, Belgium and within ING.
- 17 On 31 July 2009, DNB sent a letter to the Commission in order to inform the Commission of its legal obligations under Netherlands law on regulation and supervision of financial institutions in the Netherlands. In that letter, DNB also referred to European Union law, in so far as it contributes, by means of the European System of Central Banks (ESCB), to the smooth conduct of policies relating to the prudential supervision of credit institutions and the stability of the financial system (within the meaning of Article 105(5) EC). In that context, DNB stated that, under Netherlands law, its consent in the form of a declaration of non-objection ('Verklaring van geen bezwaar') was required for any significant measure of financial reorganisation concerning ING, given, *inter alia*, the importance of that financial institution for the Netherlands economy and the need to ensure that it holds sufficient capital to comply with its obligations. Finally, DNB informed the Commission of its wish to avoid a situation in which the Commission and DNB imposed conflicting measures upon ING under the proposed restructuring plan.
- 18 On 5 August 2009, a second meeting took place between the Commission, the Kingdom of the Netherlands, ING and DNB to discuss the restructuring plan submitted by ING. During that meeting, ING explained why the restructuring plan proposed on 12 May 2009 should be accepted by the Commission. The Commission, however, reiterated that it considered the plan insufficient.

- 19 On 10 August 2009, ING, on the one hand, and DNB, on the other, formally submitted comments to the Commission on the impaired assets measure which was the subject of the procedure under Article 88(2) EC (Case C 10/09, ex N 138/09). DNB observed that the Commission had not invited comments on the capital injection measure and stated that if the Commission were to inquire further into that measure, DNB would have comments to make in its capacity as a prudential supervisor. DNB also drew the Commission's attention to the fact that it believed that the preliminary examination procedure relating to an aid measure did not lend itself to the adoption of compensatory measures, since it did not allow third parties having an interest to submit appropriate observations. Concerning the impaired assets measure properly so-called, DNB stated, in essence, that ING was a viable company for which State aid from the Netherlands was necessary only because of the global financial crisis, that the factors relating to the valuation of the portfolio and the Netherlands State's costs were correctly assessed, that there was no justification for a guarantee fee and that the restructuring plan as submitted was what was needed in the present situation.
- 20 On 13 August 2009, ING, through the Kingdom of the Netherlands, submitted a new restructuring plan to the Commission. ING stated in that regard that the proposal was introduced in order to prevent the Commission from initiating an action for recovery regarding the capital injection which it had intimated if a credible plan was not submitted to it before mid-August 2009 and because the Commission could unilaterally impose on it all the restructuring requirements it deemed fit. The new plan was based on requirements laid down by the Commission and included asset divestments resulting in a total balance sheet reduction of more than double the value proposed previously. Presenting another option compared with the Commission's demand for a divestment of three entities, ING planned to divest itself of two of those entities, being the entity active in the United States and another one which was its principal insurance business in the Netherlands.
- 21 On 15 August 2009, DNB informed the Commission that the prudential consequences for ING of the divestment of the bank active in the Netherlands, as proposed by the Commission, would make it highly unlikely that ING could obtain a declaration of no objection from DNB in that regard.
- 22 On 18 August 2009, the Netherlands State sent ING a copy of an e-mail it had received from Ms N. Kroes, the member of the Commission responsible for competition policy, in which the Commissioner stated how, in her point of view, to reach a satisfactory outcome. First, the Commissioner considered that 'ING cannot be considered a fundamentally sound bank for the purpose of our State aid procedures', since ING had received State aid in the form of recapitalisation and impaired asset relief representing more than 2% of its risk-weighted assets ('RWA'). Second, the Commissioner noted that the parties continued to disagree on the valuation of the 'Alt-A' portfolio and the required level of remuneration to be granted to the Netherlands State. Third, the Commissioner stated that progress still needed to be made on the restructuring plan. In that regard, she pointed out that the proposed divestment by ING of its main insurance business in the Netherlands was a helpful step but that more was needed. In her opinion, an essential point remained, in particular, the need to address the distortions of competition in the retail banking market in the Netherlands. In that respect, she noted that, given ING's very strong market position, and the fact that that market is concentrated, there was no alternative to a divestment of a critical size in order to make a new entry on the market viable. Lastly, the Commissioner stated that 'unless clear progress is made this week, it [would] not be possible to have a positive decision by the end of September'.
- 23 On 21 August 2009, the member of the Commission responsible for competition policy sent a letter to DNB, responding to DNB's letter of 31 July 2009, stating that the need to ensure financial stability was particularly important for the Commission and that the views expressed by supervisory authorities on that issue would be taken into consideration. As regards assessing the restructuring measures and their effect on the common market, the Commissioner recalled however that the Commission has exclusive competence in that regard. Lastly, she stated that she had taken note of the comments sent by DNB on Case C 10/09 (ex N 138/09).

- 24 On 1 September 2009, the Kingdom of the Netherlands submitted to the Commission an economic expert's report on the competitiveness of the Netherlands retail banking and insurance market based on recent information which confirmed, according to its authors, that the retail banking and insurance market, although relatively concentrated, was competitive and efficient.
- 25 On 8 September 2009, after discussions with the Commission, the Kingdom of the Netherlands submitted an alternative divestment proposal concerning the Netherlands retail banking market. Instead of divestment of the bank active in the Netherlands, ING would divest itself of a mortgage bank, namely Westland Utrecht Hypotheekbank ('WUH'), and all the activities of Interadvies, an ING entity under the umbrella of Nationale Nederlanden. By e-mail of 14 September 2009, the Commission made clear to the Kingdom of the Netherlands its view that the proposal was clearly insufficient.
- 26 On 15 September 2009, the Commission prolonged the authorisation of the impaired assets measure (recital 4 in the preamble to the contested decision).
- 27 On 25 September 2009, DNB sent a letter to the Commission outlining all the reasons which enabled it to conclude, as a supervisory authority of the financial activities of ING, that ING was a financially viable company, both before and after receipt of the State aid granted by the Kingdom of the Netherlands. According to DNB, such a clarification was necessary in so far as DNB wished to prevent the Commission from making an inadvertent remark on that issue in the context of an assessment concerning the competition rules.
- 28 On 6 October 2009, the Commissioner responsible for competition policy sent an e-mail to ING in order inter alia to review the state of play concerning discussions on the restructuring plan. In that regard, she suggested several options in order to find a solution, including increasing the remuneration of the Netherlands State as consideration for the impaired assets measure or the divestment of an ING entity active in Germany as well as the divestment of WUH/Interadvies. The Commissioner concluded by indicating that if ING would not start to take the procedure seriously, the Commission would have no choice but to open a detailed investigation procedure and ING would have 'missed its chance'.
- 29 On 12 October 2009, ING submitted to the Commission, through the Kingdom of the Netherlands, another restructuring plan. While expressing the dissenting opinion of ING on several aspects and highlighting their desire not to have to submit further divestment measures, especially in respect of the domestic market, the plan referred, several times, to the options presented by the Commissioner responsible for competition policy in her e-mail of 6 October 2009. In particular, the plan included numerous divestments resulting in a reduction of ING's balance sheet by 45%, that is to say almost three times the balance sheet reduction proposed in the restructuring plan submitted on 12 May 2009, a ban on all acquisitions and behavioural commitments, as required by the Commission.
- 30 On 16 October 2009, the Commission requested ING and DNB to withdraw their submissions of 10 August 2009 which were made pursuant to the procedure provided for in Article 88(2) EC (Case C 10/09, ex N 138/09).
- 31 On 21 October 2009, ING sent a letter to the Commission indicating its agreement to withdraw the abovementioned observations, as requested by the Commission, in order to enable it to adopt, by 18 November 2009, a final decision concerning the aid measures referred to in paragraph 3 above. In that letter, ING stated, however, that it remained of the opinion that the impaired assets measure had been fairly priced. In response, the Commission stated, by e-mail, that it was unable to accept a letter from ING stating that the Commission had asked the observations to be withdrawn. The Commission pointed out that it 'need[s] a letter that ING is withdrawing its observations because they are [no] longer valid in view of the settlement and the expected decision'. To conclude, the Commission stated

that ‘Once again, I will not start the decision process before I have not [sic] received such a letter’. Following that e-mail, ING sent a new letter, on 21 October 2009, to comply with the Commission’s demand.

- 32 The same day, DNB also sent a letter to the Commission indicating its agreement to withdraw the abovementioned observations, as requested by the Commission, in so far as the Commission deemed that necessary in order to reach a timely settlement regarding the capital injection measure and the ‘illiquid assets’ back-up facility. DNB stated that, although it continued to stand by the views expressed in its observations, it was prepared to withdraw them in order to put an end to the uncertainty regarding ING and, therefore, in the interests of financial stability. The following day, after the Commission’s requests in that regard, DNB sent a further letter to the Commission stating that, this time, it was withdrawing its observations without mentioning that such a withdrawal had been requested by the Commission and without referring to the ‘interests of financial stability’.
- 33 On 22 October 2009, the Kingdom of the Netherlands submitted the revised ING restructuring plan. On that date, the Kingdom of the Netherlands also informed the Commission of an amendment to the repayment terms referred to in paragraph 4 above.
- 34 Thereafter, further discussions took place between the Commission and ING concerning, in particular, the factors taken into account with regard to the new repayment terms and the substance and geographic scope of the price leadership ban desired by the Commission.
- 35 On 6 November 2009, at 4.12 a.m., the Commission sent the Kingdom of the Netherlands and ING a draft of the first part of the decision it intended to adopt, asking them to check the details mentioned therein by 10 a.m. The draft consisted of 92 recitals and covered what became paragraphs 1 to 4 of the contested decision, that is to say the paragraphs concerning the procedure, the description of the facts, the presentation of the restructuring plan and the reasons for opening the investigation. In recital 30 of the draft, which became recital 34 in the preamble to the contested decision, after mentioning an amendment to the agreement for repayment submitted by the Kingdom of the Netherlands, it was stated, first, that ‘[i]n other words, considering that ING would normally have to pay EUR 2.5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1.79 and 2.5 billion depending on the market price of ING shares’ and, second, that ‘[t]he Netherlands authorities explained that the reason for the amendment was to allow ING similar conditions for exit to those which had been granted to SNS and AEGON on the capital injections that they received from the Netherlands’.
- 36 By e-mail dated 6 November 2009, sent at 8.45 a.m., ING responded to the Commission saying that the deadline was too tight to review a 23-page document and asked whether there was any flexibility on the time by which their remarks were needed. By e-mail of the same date, sent at 11.02 a.m., ING told the Commission that their comments were nearly ready to submit and would be sent very soon. ING stated, however, that the Commission’s proposal on price leadership had still not been agreed by those responsible and would be subject to further internal discussions. By e-mail of the same date, sent at 11.15 a.m., the Commission responded that it was awaiting ING’s comments, clarifying that it had asked whether there were any factual errors contained in the draft and that it had not requested comments on the text, although it would read them.
- 37 ING sent its comments in the course of that day to the Commission which responded by saying that the majority of the comments were not factual corrections but rather rephrasing. The Commission also requested clarifications of some comments made by ING, which replied by e-mail on 6 November 2009 at 7.37 p.m.
- 38 On 18 November 2009, the Commission adopted the contested decision.

3. *Content of the contested decision*

- 39 Notwithstanding the title of the contested decision, which refers only to the second aid measure (Case N 138/09), the Commission also rules in that decision on the capital injection aid granted (Case N 528/08) (see *inter alia* recitals 1, 32 to 35, 97 to 100, 133 and 156 and the first and second paragraphs of Article 2 of the contested decision) and on the aid in the form of guarantees granted on medium-term liabilities approved by the Commission decisions concerning the Netherlands guarantee scheme (Cases N 524/08 and N 379/09).
- 40 With regard to the guarantees granted by the Kingdom of the Netherlands pursuant to the third aid measure, the contested decision states that they are covered by the Netherlands guarantee scheme initially approved by the Commission decision of 30 October 2008 (Case N 524/08), and again the Commission decision of 7 July 2009 (Case N 379/09) (recital 5 in the preamble to the contested decision).
- 41 In the introductory part of the contested decision, the Commission recalled that it gave interested parties the right to submit their observations in conformity with the requirements of the EC Treaty. It refers on that point to the opening decision (see paragraph 13 above) and points out that it received no comments from the interested parties.
- 42 Under paragraph 2 ‘Description of the Facts’, the Commission presents the capital injection and the repayment terms amendment in recitals 33 to 35 in the preamble to the contested decision as follows:
- ‘(33) The issue price for an injection of EUR 10 billion of Core-Tier 1 capital was EUR 10 per security. On the initiative of ING, the securities can either be repurchased at EUR 15 per security (a 50% redemption premium to the issue price), or, after three years, be converted into ordinary shares on a one for one basis. If ING triggers the conversion option, the Netherlands has the choice to opt for the alternative redemption of the securities at a rate of EUR 10 per security plus accrued interest. A coupon will only be paid for the Netherlands if a dividend is paid on the ordinary shares.
- (34) In the framework of the restructuring plan the Netherlands has submitted an amendment to the agreement for repayment of the Tier 1 securities by ING. According to the amended terms ING is able to repurchase up to 50% of the Core-Tier 1 securities at the issue price (EUR 10), plus the accrued interest in relation to the 8.5% annual coupon (around EUR 253 million), plus an early repayment penalty when the ING share price trades above EUR 10. The early redemption penalty increases with the ING share price. For the purpose of the calculation of the early redemption premium the share price increase is capped at EUR 12.45. At that level the penalty is equal to 13% on an annual basis. The early redemption penalty could amount to a maximum of EUR 705 million assuming that the EUR 5 billion are repaid 400 days after the date of issue. Furthermore the penalty/premium has a floor of EUR 340 million, ensuring a minimum internal rate of return for the Netherlands of 15%. In other words, considering that ING would normally have to pay a EUR 2.5 billion redemption premium this amendment would result in an additional advantage for ING between EUR 1.79 and 2.2 billion depending on the market price of ING shares. The Netherlands explained that the reason for the amendment was to allow ING similar conditions for exit to those which had been granted to SNS and AEGON on the capital injections that they received from the Netherlands. Those early prepayment conditions can only be applied to the repayment of EUR 5 billion (that is to say 50% of the initial capital injection).
- (35) ING may elect to make use of the repurchase option prior to 31 January 2010, but that date can, upon agreement with the Netherlands, be extended until 1 April 2010 due to exceptional market circumstances if ING can demonstrate that it was not economically feasible to raise sufficient

Core-Tier 1 capital necessary to repurchase EUR 5 billion earlier. Such an extension would then be subject to Commission approval. ING aims to make use of the repurchase option prior to 1 January 2010. Repayment and conversion options on the remaining 50% are unaltered.'

43 In the context of its assessment of the aid pursuant to Article 87(1) EC, the Commission states under paragraph 5.1 'Existence of aid' as follows in recitals 97 to 99 in the preamble to the contested decision:

'(97) The Commission has already established in the opening decision that the recapitalisation of ING constitutes State aid amounting to the sum of the injected capital, that is to say, EUR 10 billion.

(98) The amendment of the redemption premium also constitutes State aid in so far as the State waives its right to obtain revenues. As ING has already agreed to a redemption premium of 150% any reduction is indeed forgone revenue. The modification of the repayment terms for the capital injection results in an additional benefit for ING. This represents additional aid of approximately EUR 2 billion as indicated above in recital 34.

(99) As regards the [impaired assets] measure, the Commission has found in the opening decision that the measure constitutes aid. The aid amount resulting from [that measure] is calculated as the difference between the transfer price (based on the real economic value) and the market price of the transferred portfolio ... The resulting difference between the transfer price and the market price of the transferred portfolio is USD 6.5 billion, which corresponds to around EUR 5 billion. The aid amount resulting from the [impaired assets] measure is therefore considered to be EUR 5 billion.'

44 Thereafter, the Commission examined how the aid in question had been allocated within ING in order to assess the amount of aid taking into consideration the RWA of ING:

'(100) The EUR 10 billion of capital injection has been initially allocated as follows within the group: EUR 5 billion to ING Bank, EUR 4 billion to ING Insurance and EUR 1 billion at the level of the holding. ING has the possibility to transfer the amount of capital injection at any time between ING Bank, ING Insurance and the holding level.

(101) Furthermore, 85% of the cash flows transferred to the Netherlands under the [impaired assets] measure covered assets held by ING Bank and 15% assets held by ING Insurance. Of the total aid amount resulting from the [impaired assets] measure (EUR 5 billion) EUR 4.25 billion is therefore to be attributed to ING Bank and EUR 0.75 billion to ING Insurance.

(102) This results in a total aid amount for ING Bank of EUR 9.25 billion (representing 2.7% of the RWA of ING Bank), a total aid amount for ING Insurance of EUR 4.75 billion (representing 50% of the solvency margin requirements of ING Insurance and EUR 1 billion remaining at the holding level.

(103) For the sake of simplicity and for consistency with the terms used in the Impaired Asset Communication, the total aid amount can also be expressed in RWAs of ING Bank only. In that case, both measures together plus the additional aid from the reduction of the redemption premium of EUR 2 billion result in an aid element of about EUR 17 billion, which amounts to about 5% of [the RWA] of ING Bank.'

45 Concluding its assessment of the existence of the aid, the Commission thus states in recital 106 in the preamble to the contested decision, taking into account all the aid measures granted to ING:

'(106) In total, therefore, ING will receive restructuring aid of up to EUR [12 to 22] billion in liquidity guarantees and about EUR 17 billion of other aid, amounting to about 5% of RWA of the bank.'

46 Concluding its analysis of the measures granted to ING, the Commission refers to recitals 155 to 157 in the preamble to the contested decision:

‘(155) It is concluded, firstly, that on the basis of the amendments presented by the Netherlands on 20 October 2009 the [impaired assets] measure is in line with the Impaired Asset Communication and should thus be declared compatible with the common market pursuant to Article 87(3)(b) [EC].

(156) Second, it is concluded that the restructuring measures enable ING to restore its long-term viability, are sufficient with respect to burden sharing and are appropriate and proportional to offset the competition distorting effects of the aid measures in question. The restructuring plan submitted, fulfils the criteria of the Restructuring Communication and should therefore be considered compatible with the common market pursuant to Article 87(3)(b) [EC]. The capital injection measures and the guarantees which have already been granted can therefore be prolonged in accordance with the restructuring plan. However, the temporary balance sheet restrictions imposed in Decision N 528/08 should be removed.

(157) Thirdly, it is concluded that the additional aid measures presented in the framework of the restructuring plan, that is to say the modification of the terms of the repurchase of the Core Tier 1 securities from the Netherlands and the foreseen liability guarantees, should also be declared compatible with the common market pursuant to Article 87(3)(b) [EC], given the depth of the measures for addressing market distortions presented in the restructuring plan and the fact that the aid helps the beneficiary to enhance its viability. This also concerns the aid deriving from the changed terms of the repayment arrangements of the capital granted by the Netherlands.’

47 Consequently, in Article 2 of the contested decision, the Commission states, in the first paragraph, that ‘[t]he restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) [EC]’ and, in the second paragraph, that ‘[t]he aid is compatible with the common market, subject to the commitments set out in Annex II’.

48 According to Annex II to the contested decision, a number of commitments must in particular be respected:

- ING’s balance sheet is to be reduced, before the end of 2013, by 45% compared to its balance sheet as at 30 September 2008, that is to say a reduction of EUR 616 billion compared to EUR 1 376 billion (see recital 54 in the preamble to the contested decision). To that end, ING will have to divest itself of its insurance branch, ING Direct US and other entities (see recital 57 in the preamble to the contested decision), according to a staggered timetable at the end of 2011, 2012 and, finally 2013: 20% total balance sheet reduction before the end of 2011; 30% before the end of 2012 and 45% from then until the end of 2013. An extension of the final deadline may be granted by the Commission at the request of the Kingdom of the Netherlands.
- The Kingdom of the Netherlands commits that ING will adhere to a ban on acquisitions for three years starting from the date of decision or until full repayment of the securities. The Commission may approve an acquisition if it proves essential in order to safeguard stability or competition in the relevant markets.
- The Kingdom of the Netherlands commits to prohibit ING from acting as price leader. Without prior authorisation of the Commission, ING will not offer more favourable prices on certain products and certain markets than its three best-priced direct competitors. ING Direct will also refrain, without prior authorisation of the Commission, from exercising a controlling influence on certain prices and certain markets. Those commitments are valid for three years from the date of the decision or until full repayment of the securities.

- The Kingdom of the Netherlands commits to a number of detailed provisions as regards ING, including the cessation of the so-called WUH/InterAdvies activity, the restoration of viability, the deferral of coupons and the repayment of so-called Tier 1 and Tier 2 securities and restrictions on remunerations and marketing policy.
- The Netherlands authorities commit that the full restructuring of ING will be completed before the end of 2013.

49 In addition, in Article 1 of the contested decision, the Commission states, in the first paragraph, that '[t]he impaired asset measure provided by the Netherlands for the so-called Alt-A portfolio of ING constitutes State aid within the meaning of Article 87(1) [EC]' and, in the second paragraph, that that 'aid is compatible with the common market, subject to the commitments set out in Annex I.'

Procedure and forms of order sought by the parties

- 50 By application lodged at the Registry of the General Court on 28 January 2010, the Kingdom of the Netherlands brought the action in Case T-29/10.
- 51 By application lodged at the Registry of the Court on the same date, ING brought the action in Case T-33/10.
- 52 By separate documents submitted when filing those applications, the Kingdom of the Netherlands and ING applied, in so far as they are concerned, for the cases to be dealt with under an expedited procedure and to be joined in the interests of the proper conduct of that procedure.
- 53 On 16 February 2010, the Commission submitted its observations on those applications, stating that it opposed the applications for an expedited procedure and for the cases to be joined.
- 54 By decision of 15 March 2010, the Court (Third Chamber) decided to reject the requests for the cases to be dealt with under an expedited procedure. By decision on the same day, the President of the Court decided, on the request of the Third Chamber, to order that the cases be given priority, pursuant to the first sentence of Article 55(2) of the Rules of Procedure of the General Court.
- 55 By order of 15 March 2010, the President of the Third Chamber of the Court decided to join Cases T-29/10 and T-33/10 for the purposes of the written procedure and the oral procedure.
- 56 On 23 April 2010, DNB applied for leave to intervene in Case T-33/10 in support of the form of order sought by ING.
- 57 By order of 14 July 2010, the General Court (Third Chamber) granted DNB leave to intervene and the latter submitted its observations on 30 August 2010.
- 58 Following changes to the composition of the Chambers of the General Court, the Judge-Rapporteur initially appointed was assigned to the First Chamber, to which the present case has therefore been allocated. Since a member of the First Chamber was prevented from sitting, the President of the Court designated, pursuant to Article 32(3) of the Rules of Procedure, another judge to complete the Chamber.
- 59 Upon hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and, in the context of the measures of organisation of procedure, invited the parties to reply to a series of questions concerning, first, the concept of 'restructuring aid' used in the first paragraph of Article 2 of the contested decision and, second, the scope of the heads of claim of the Kingdom of the Netherlands and ING ('the written questions').

- 60 The parties replied to those written questions on 18 May 2011.
- 61 In the context of the measures of organisation of procedure, the Court drew the attention of the parties to the fact that at the hearing they could submit their observations on those replies and in particular on certain points that had been specifically drawn to the attention of, respectively, the Commission, on the one hand, and the Kingdom of the Netherlands, ING and DNB, on the other hand.
- 62 The parties presented oral argument and replied to the questions put by the Court at the hearing on 12 July 2011.
- 63 In the light of the parties' observations (see paragraphs 52 and 53 above), the Court decided to join the present cases for the purposes of the judgment pursuant to Article 50 of the Rules of Procedure.
- 64 In Case T-29/10, the Kingdom of the Netherlands claims that the Court should:
- annul the first paragraph of Article 2 of the contested decision which is based inter alia on the finding in recital 98 in the preamble to that decision that the amendment to the repayment terms for the capital injection granted by the Netherlands authorities represents additional aid to ING of approximately EUR 2 billion;
 - order the Commission to pay the costs.
- 65 The Commission contends that the Court should:
- dismiss the application;
 - order the Kingdom of the Netherlands to pay the costs.
- 66 In Case T-33/10 ING, supported by DNB, claims that the Court should:
- annul the contested decision, in so far as it finds that the amendment to the repayment terms for the capital injection represents additional aid of approximately EUR 2 billion;
 - annul the contested decision, in so far as the Commission made approval of the aid conditional upon the acceptance of price leadership bans, as set out in the decision and in its Annex II;
 - annul the contested Decision, insofar as the Commission made approval of the aid conditional upon restructuring requirements that go beyond what is proportionate and required under the Commission Communication on Restructuring;
 - order the Commission to pay the costs;
- 67 The Commission contends that the Court should:
- dismiss the action as in part inadmissible and in part unfounded;
 - in the alternative, dismiss the application as unfounded;
 - order ING to pay the costs.
- 68 With regard to the arguments concerning admissibility, the Commission does not dispute the admissibility of ING's first head of claim, seeking to annul the contested decision in so far as it finds that the amendment to the capital injection repayment terms represents additional aid of

approximately EUR 2 billion. By contrast, the Commission contends that it is not certain that ING is entitled to contest, in its second and third heads of claim, first, the prohibitions imposed on ING on exercising a controlling influence on prices and, second, the restructuring requirements to be met by ING (see paragraph 48 above). According to the Commission, the contested decision authorises ING to receive State aid in respect of which the Kingdom of the Netherlands has requested authorisation which was granted to it on the basis of commitments given by that State. Consequently, assuming the definition of the aid to be correct, the decision would not give rise to any legal effects capable of harming ING's interests. For its part, ING observes that its legal situation is affected by the contested decision because the State aid is declared to be compatible with the common market subject to the commitments stated in Annex II of the contested decision and because the substance of those commitments was imposed by the Commission, *inter alia* with regard to the obligation to sell certain assets or to accept certain restrictions.

Law

- 69 In Case T-29/10, the Kingdom of the Netherlands relies on three pleas in law in support of its action for annulment (see paragraph 64 above). The first plea alleges the infringement of Article 87 EC in so far as, in recital 98 in the preamble to the contested decision, it is stated that the amendment to the capital injection repayment terms represents additional aid to ING of approximately EUR 2 billion. The second alleges breach of the principle of sound administration. The third alleges infringement of the obligation to state reasons, because the Commission failed to give adequate reasons in support of its censure of the amendment to the capital injection repayment terms.
- 70 In Case T-33/10, ING also relies on three pleas in law, each of which corresponds to one of its three claims for annulment (see paragraph 66 above). The first plea, which is divided into two branches, alleges, first, infringement of Article 87 EC, in so far as the contested decision considers that the amendment of the capital injection repayment terms constitutes additional State aid and, second, infringement of the principle of sound administration and the obligation to state reasons. The second plea alleges infringement of the provisions applicable to the circumstances in which it is possible to ban an undertaking from acting as price leader. The third alleges infringement of the principle of proportionality with regard to the restructuring requirements.
- 71 The arguments of the Kingdom of the Netherlands in its three pleas in support of its application for annulment can be considered together with the arguments made by ING in the two branches of its first plea in support of its first head of claim. Those arguments all refer, in substance, to the classification as additional aid made by the Commission in the contested decision following the amendment to the capital injection repayment terms which had been communicated to it by the Kingdom of the Netherlands in the administrative procedure.
- 72 Consequently, first, it is necessary to link and to examine together all the arguments referred to in paragraph 71 above. Those arguments can be distinguished from the arguments relied upon by ING in its second and third pleas in law, which concern a subsequent aspect of the analysis, that is to say no longer the classification as aid in the light of Article 87(1) EC but the nature and scope of the commitments to be respected so that the aid is compatible with the common market pursuant to Article 87(3)(b) EC.

A – *Classification as additional aid*

1. *Arguments of the parties*

73 In essence, the applicants rely on two types of arguments in order to criticise the classification as State aid made following the amendment to the capital injection repayment terms communicated in the course of the procedure. Some of those arguments concern substantive lawfulness and the substantive provisions laid down in Article 87(1) EC, in particular concerning the concept of ‘advantage’, whereas others, in part identical, relate to lawfulness on procedural grounds and are based on the obligation of diligence and the duty to state reasons, including the right to be heard or even merely informed.

a) The arguments concerning Article 87(1) EC

74 The Kingdom of the Netherlands and ING maintain that the Commission was wrong to consider that the amendment to the repayment terms constituted additional State aid in the light of Article 87(1) EC. First, the applicants claim that, if a capital injection contains an aid equivalent to the total amount of the injected capital, the amendment to the terms for its repayment cannot be considered as additional aid. Second, the Kingdom of the Netherlands observes that the Commission should have taken into account the amendment to the repayment terms in its assessment of the aid granted as a capital injection, since that amendment had been communicated to it before it adopted the contested decision. Third, the applicants claim that, assuming the Commission is in a position to analyse the amendment to the repayment terms separately, it then committed a number of mistakes in its assessment: first, it wrongly considered that, in the absence of such an amendment, ING would also have repaid EUR 5 billion early; second, the Commission failed to take into account the fact that, thanks to that amendment, the payment of the interest at the time of repayment no longer depended on payment of a dividend on the ordinary shares; finally, the Commission did not compare the behaviour of the Netherlands authorities with that of a private investor. Fourth, the applicants point out that the Commission did not include in its reasoning the fact that the objective of the amendment to the repayment terms was to align those terms with those which had been agreed with other Netherlands financial institutions.

The effect of the assessment made in the contested decision on the amount of the capital injection aid

75 First, the Kingdom of the Netherlands and ING, supported by DNB, recall that a State measure constitutes aid if its recipient receives an advantage that it would not have obtained under normal market terms. In the case of capital injections, the test for determining what advantage is granted is in principle the difference between the conditions under which the State has injected the capital and the conditions under which a private investor would have done so. It is only where, exceptionally, no capital injection could have been obtained on the market that the element of the aid could be equal to the total capital injection. In that case, the amendment to the terms under which that injection was granted is no longer relevant for the assessment of the scope of the aid and cannot be considered as additional State aid. In the present case the Commission stated in the contested decision that the capital injection constituted State aid of an amount equal to the total capital injected. That is therefore to be regarded as a gift. Thus, the Commission cannot consider the amendment to the repayment terms regarding the capital injection, which it assimilates to a gift, as ‘additional aid’. Logically, the fact that the capital might be redeemed should lead to the conclusion that the aid amount is less than the amount of that injection. With regard to the initial decision, the applicants observe that it only provisionally approved the recapitalisation measure and, at that stage, the Commission had not ruled on the aid of the amount represented by the capital injection measure.

76 For the Commission, the question whether an investment secures an advantage which the undertaking would not have been able to obtain on the market involves a complex economic appraisal subject to limited review. In that regard, it states that according to the initial decision that the whole capital injection constituted State aid. As set out in that decision, ING received an advantage whereas, without the intervention of the Netherlands State, ING could not have obtained such financing within the timescale and under comparable conditions taking into account inter alia the volatile market situation. The applicants did not object to that finding and they did not challenge the initial decision, so that the Commission did not develop the issue further in the contested decision. The Commission also states that the relevant moment at which to evaluate the economic rationality of the State's behaviour is when the measures were adopted. The new capital injection repayment terms must therefore be compared with the repayment terms initially agreed in October 2008 between the Netherlands State and ING and not the market conditions. Since the Netherlands State waived its right to part of the remuneration initially agreed, ING therefore received a new advantage.

The need to examine all aspects of the capital injection

77 Second, the Kingdom of the Netherlands claims that, in order to assess the capital injection measure, the Commission should have taken into account the amendment of the repayment terms which had been communicated to it before adopting a final decision on that point. The Commission's approach, according to which an amended measure could be assessed not in the light of its final nature but on the basis of a comparison between the initial repayment terms and the terms as subsequently modified, is incompatible with Article 87(1) EC. In addition, if the Commission considered that the amendment to the repayment terms constituted additional State aid, which may be unlawful, it should have opened a formal assessment procedure in order to assess that measure. However, instead of proceeding in that way, the Commission examined the amendment to the repayment terms in the procedure corresponding to the capital injection.

78 The Commission recalls that the existence and extent of aid are to be assessed in the light of the circumstances prevailing when it was granted and not at the date of adoption of the decision. Thus, in October 2008, the Kingdom of the Netherlands granted to ING an advantage of EUR 10 billion, being the total capital injection made at that time. Equally, in October 2009, the Netherlands State again favoured ING, by amending the repayment terms provided for the previous year. The Commission has an obligation to examine separately each of those measures, which conferred an advantage at different times. With regard to the first of those measures, the Commission acknowledges that it approved it provisionally in the initial decision. That provisional character however applies only to the approval of that measure and not to the classification of the capital injection as aid, which is final as from that stage. Indeed, the initial decision could not be relied upon to argue that every subsequent measure in favour of ING concerning the capital injection could not be regarded as additional aid. Moreover, the fact that the amendment to the repayment terms was examined in the procedure opened in order to examine the capital injection (Case N 525/08), without demanding a formal notification, does not affect the existence of the two aid measures. While it is probable that the aid granted in the context of that amendment may be classified as State aid, it is nevertheless not necessary to decide that question. In the present case, the Commission did not regard it as necessary to open a formal assessment procedure because it considered that the amendment to the repayment terms was linked to the subscription agreed between the Kingdom of the Netherlands and ING concerning the capital injection. To that extent, the contested decision is to be regarded as a decision not to raise an objection within the meaning of Article 4(3) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 [EC] (OJ 1999 L 83, p. 1).

Comparison of the repayment terms in the light of the private investor principle

79 Third, supposing that the Commission may assess separately the amendment of the capital injection repayment terms, the Kingdom of the Netherlands claims that the Commission's assessment in that regard is wrong on several points and ING, supported by DNB, states that that amendment was in conformity with the private investor principle.

– The premiss of the Commission's reasoning

80 First, the applicants criticise the premiss of the Commission's reasoning according to which, in the absence of the amendment to the repayment terms, ING would in any case have repaid EUR 5 billion early. In recitals 34 and 98 in the preamble to the contested decision, the Commission held that that amendment resulted in additional aid of approximately EUR 2 billion, comparing the amended terms with the initial ones. On the basis of the initial terms, ING could repurchase the securities at EUR 15 per security or, as from November 2011, redeem them at purchase price, plus accrued interest. The State would therefore have received a premium of EUR 2.5 billion in the case of early repayment. However, in the light of the considerable size of that premium and taking into account the movement of the share price, it is very unlikely that ING would have repaid the capital injection early if the State had not amended the initial terms. ING was entitled to wait until November 2011 in order to convert the securities into shares and, if the State had therefore wanted to prevent the conversion, the only possible solution was to require repayment of the original issue price of EUR 10, plus accrued interest. The State therefore ran the risk of seeing its participation endure in the long-term without gaining the slightest return, since the coupon depends on the payment of a dividend. The Commission's assumption in its reasoning in order to arrive at the conclusion that, on the basis of the initial terms, the State would have received approximately EUR 2 billion more than it would under the new terms, is unrealistic. The Commission wrongly states that the State waives 'its right to obtain revenues'. The 50% redemption premium provided for in the initial agreement is not in any sense a 'right' of the State since ING had the choice to opt or not to opt for such a solution. In any event, the examination of ING's share price, which was significantly lower than EUR 15, shows clearly that it was neither possible nor even desirable for ING to repay EUR 5 billion early on the basis of the initial terms.

81 In addition, the applicants reject the implications of the references made to various documents which they could have presented during the administrative procedure. Thus, while ING had stated that its priority was to find a means of repaying the Netherlands State as quickly as possible, that was in response to a Commission question which sought to establish whether ING intended to carry out any acquisitions in the course of the next five years. Equally, the restructuring plan presented to the Commission could not be relied upon in support of the idea that ING would have made a repayment in any case under the initial terms. The assumption that the aid would be reimbursed at 150% was envisaged in that document only for planning purposes. That assumption also took into consideration a reimbursement at 150% of the issue price at the end of 2013, that is to say five years after issue, which was completed different from a reimbursement in 2009. A reimbursement at 150% in 2013 would provide an annual return of 12.4%, clearly less than the return of between 15% and 21.5% which the State could achieve on the EUR 5 billion repaid early on the basis of the amended terms. To repay 150% one year after issue would simply be prohibitive. In addition, ING's reply to a Commission question in which ING states that a repayment before the end of 2010 'may be possible if the economic situation improves more quickly than in the case at issue' still does not imply that such a repayment would take place. ING also indicates in that reply that a repayment during the first three years would hardly be possible given the tax loss limitations in the United States which limited the possibilities of carrying out a significant issue during that period or of selling part of the undertaking. Equally, it had to be taken into account that in the initial decision the Commission required the Kingdom of the Netherlands to indicate to it whether the return on the capital injection would be less than 10% (see recitals 32 and 67 in the preamble to the initial decision), which clearly shows that the Commission knew it would be possible that the redemption premium of 50% would

not be paid. Finally, the Commission could not reasonably claim that it was operating on the assumption that ING would maintain its dividend policy and that it would thus also pay an annual coupon of 8.5%. A dividend can be paid only if results so allow. The fact that a dividend was paid in the past does not make it possible to believe that the same will occur in the future, and certainly not in the particularly uncertain situation created by the financial crisis.

- 82 The Commission observes that the probability of repayment of the capital injection is not taken into consideration in the evaluation of the existence of State aid. In order to evaluate the existence of such aid, it is necessary to determine whether the State has granted ING an advantage and, in the present case, whether the amendment to the repayment terms in October 2009 would have given ING the possibility of repaying EUR 5 billion under more favourable terms than those initially agreed. The Commission acknowledges that it is correct that ING had the right to convert the securities into shares from November 2011. However, ING always insisted on the fact that it wanted to repay the State as quickly as possible. On 7 July 2009, the applicants replied as follows to the questions posed by the Commission regarding the restructuring plan: '[i]t is ING's top priority to find ways to repay the Dutch government as soon as practical and possible', '[r]epaying is a priority for ING management and it will do whatever is possible and feasible to advance those payments, and '[f]or planning purposes they have been modelled to be repaid in full at once at year end 2013 per the contractual terms of the repurchase option'. ING thus took the view that the repurchase would have to be undertaken according to the initial terms. ING also indicated that such a partial early repurchase was possible when it stated: 'Earlier repurchase or early partial repurchase of the Core Tier-I securities might be possible if economic conditions improve more quickly than assumed in the base case'. The Commission also states that it is correct that ING was not obliged to reimburse or convert the securities and that the State therefore ran the risk that its participation would not generate the slightest return for a long period, since the coupon paid to the State depended on payment of a dividend. In recital 31 in the preamble to the initial decision, the Commission however stated that ING had declared that it would maintain its existing dividend policy. According to that policy and before the financial crisis, ING had paid a dividend of at least EUR 0.74 euro per share every year since 1999. According to the Commission, in recital 67 in the preamble to the decision, the Commission had also made clear that, in order to calculate the probable return generated by the securities for the State, a dividend would in any case be paid every year and that an annual coupon at an annual rate of 8.5% would therefore also be paid as a result. ING never previously contested that assertion.

– The advantage conferred on the State by the new terms

- 83 Second, the Kingdom of the Netherlands claims that the Commission did not take into consideration in its assessment of the additional aid the fact that, following the amendment to the repayment terms, the payment of the interest accrued at the time of repayment no longer depended on payment of a dividend. In the present case, the coupon payable on EUR 5 billion repaid on 21 December 2009 gave rise to the payment of EUR 258.5 million to the State, a sum which was not due in the case of repayment under the initial terms. By not taking that advantage into account, the Commission in any case overestimated the alleged aid, which amounted not to between EUR 1.79 and 2.2 billion, as stated in the initial decision, but between EUR 1.5 billion and 1.9 billion. In addition, the Kingdom of the Netherlands observes that, while it did not react in that regard to the draft description of the facts of the decision sent by the Commission on 6 November 2009, that it was because of the very brief period given by the Commission to reply and because the consequences of that incorrect presentation of the facts were not apparent. Irrespective of that, the lack of reaction by the Netherlands authorities and ING cannot put right the error made by the Commission in the contested decision. Finally, it would be wrong to believe that the State could claim payment of the coupon in 2009 on the basis of the initial terms on the ground that ING had paid a dividend in 2008. The coupons are paid on 12 May, with retroactive effect. Thus, whereas, on 12 May 2009, the State indeed received a coupon in respect of the period between 12 November 2008 and 12 May 2009, because ING had paid a

dividend for 2008, on the assumption however of repayment at 150% on 21 December 2009, the State did not receive any coupon in respect of the period between 12 May and 21 December 2009 on the basis of the initial terms, because ING did not pay any dividend for 2009.

- 84 The Commission observes that the State did not refer to that alleged advantage when it communicated the amendment to the repayment terms. Equally, neither the Netherlands State nor ING objected to the alleged error when the Commission sent them a draft description of the facts of the decision, referring to an additional advantage for ING of between EUR 1.79 and 2.5 billion. In addition, even supposing that the stated error had been made, it was irrelevant because the advantage arising from the amendment of the repayment conditions fluctuated, after correction, between EUR 1.5 and 1.9 billion and not, as stated in the contested decision, between EUR 1.79 and 2.2 billion. The estimates contained in the contested decision and those in the application thus largely tally. As the alleged error in calculation does not affect the substance, it cannot lead to the requested annulment. Finally, as ING had paid a dividend for 2008, the State could have claimed payment of the coupon in the event of repayment of the securities in 2009 pursuant to the initial terms.

– Behaviour of a private investor

- 85 Third, the Kingdom of the Netherlands and ING, supported by DNB, claim that the Commission should have analysed the amendment to the repayment terms in the light of the private investor principle. The applicants recall that the initial terms allowed the State to require a redemption premium of 50% in the event of early repayment. Thus, in the light of the movement of the share price in the period between the date of issue and the end of October 2009, a price which was always significantly lower than EUR 15, there was nothing to encourage ING to repay the capital injection before the due date. In such circumstances, the applicants underline that a private investor would have found it attractive to opt for the amended terms because they guaranteed a minimum return of 15% per year for half of the investment attractive. The State would have exchanged a speculative return of 50% spread over an indeterminate number of years for a certain return of between 15 and 21.5% per year for half of its investment. At issue is a decision based on sound economics, since in particular it was hardly likely that ING would redeem the securities at 150% within a foreseeable period of time. Finally, the applicants note that the Commission had stated in its initial decision that the rate of return which could be envisaged under the initial agreement was greater than 10% but lower than 15%. Following the amendment of the reimbursement terms, that rate increased to the State's benefit. In any case, if ING had chosen to repay the securities on the basis of the initial agreement, it would most probably not have paid any dividend to its shareholders. ING would have had to retain its profits in order to repay the securities. DNB also states that the amended terms are preferable on policy grounds, since they facilitate the State's exit and allow for a rapid repayment of capital at a higher rate than that considered appropriate by the Commission.
- 86 With regard to the argument that the securities issued at the time of the capital injection cost ING more than the ordinary shares, because of the higher coupon and the rights granted to the State, which would encourage ING to repay as quickly as possible, the applicants claim that it is, ultimately, the ING share price which determines whether there is a genuine possibility that the capital injection will be repaid under the initial terms. At a price substantially lower than EUR 15, ING was not able to issue the capital necessary to obtain the sum required for repayment. The fact that ING bought the securities at EUR 11.21 whereas the average ING share price during the earlier period was lower than EUR 10 does not change anything and can be explained by the divergence which necessarily exists between the time when the transaction is announced and when it is authorised, and then carried out. With regard to the Commission's doubts concerning the movement of the ING share price, which could have permitted early repayment pursuant to the initial terms, the applicants claim that it must be asked whether, faced in autumn 2009 with the choice between early repayment pursuant to the amended terms and the maintenance of the initial terms a private investor could, realistically, wait until the ING share price rose within a foreseeable period of time to a level at which to repay at 150% pursuant to the initial terms would be attractive for ING. In autumn 2009, no such hope could be

entertained in the light of the movement of the share price at that period and the general perception that the crisis was far from over. The subsequent movement in the share price confirmed that supposition. The Commission cannot therefore claim, without further elaboration, that it was quite possible that the share price would go up again to EUR 15 in the ‘next years’. Regarding the argument that other scenarios existed concerning the rate of return on investment, the Commission continued to make the error of considering that repurchase of the securities at EUR 15 in the course of the first three years would be a realistic option, which is not the case from the point of view of a private investor in autumn 2009. Replying to the argument regarding the brief interval and the relationship between the initial agreement and its amendment, which the Commission believes prevents recourse to the private investor principle, the Kingdom of the Netherlands points out that the Commission’s argument is contradictory in so far as the question is whether the amendment to the repayment terms could be considered as aid independently of the capital injection. In the present case, there is only one and the same capital injection, granted in order to remedy a serious disturbance in the economy of a Member State, and it is only the repayment terms which have been amended.

- 87 The Commission submits that the behaviour of the State cannot be compared with that of a private investor. It is unlikely that a private investor would have approved the amendment to the repayment terms to which the Netherlands State agreed. In general, the Commission considers that the private investor principle does not apply to an additional measure in favour of the recipient of State aid which is being restructured. According to the Commission, where restructuring aid has already been granted to an undertaking in difficulty, other forms of financial aid would not usually be analysed pursuant to the private investor principle. However, since the initial agreement and the amendment agreement were concluded within a short time of each other, on 11 November 2008 and 24 October 2009 respectively, as part of the restructuring of ING on the basis of the financial crisis, the amendment to the repayment terms cannot be separated from the initial agreement so that it can be assessed in the light of the private investor test. In any case, the amendment at issue is not in conformity with that test. The right question is whether, taking into account the fact that ING wished to repurchase half of the securities in 2009, the amendment to the repayment terms conferred an advantage on it compared to the initial agreement, which was clearly the case. Furthermore, not only did the applicants confirm on several occasions during the administrative procedure that ING wished quickly to repay the capital injection; those securities also had negative consequences for ING and its shareholders. The facts even prove that the argument that it would be unlikely that ING would repurchase the securities at a price greater than the market value of the ordinary shares (that is to say EUR 15 plus the repayment premium) is incorrect, because ING actually repurchased half of those securities following the amendment to the repayment terms at EUR 11.21 per security, whereas the average price of an ordinary share was less than EUR 10 for the five-day period which preceded that transaction. The Commission also doubts that the early repayment of the securities could not be taken for granted given the movement in the share price during the period from the date of issue until the end of October 2009, during which the ING share price was always considerably lower than EUR 15. Admittedly, the Commission acknowledged that ING shares had reached a floor during the first half of 2009, falling to around EUR 2.5 in value, but that value had risen steeply again thereafter. On the eve of the announcement of the amendment to the repayment terms and of the issue of shares necessary to that end, shares traded at a value of EUR 11.66, that is to say more than four times the value achieved about six months previously. It was not therefore impossible that such a trend would continue. ING shares even traded, around 2001, at EUR 43. It was therefore certainly possible that the share price could rise to EUR 15, the price from which ING says it would have repurchased the securities on the terms initially provided for. Finally, the Commission qualifies the argument that it would be attractive for a private investor to opt for the amended repayment terms, because they guarantee a return of at least 15% annually for half of its investment. Even following that amendment, the State could not be absolutely sure that it would be repaid. The risk remained that ING would not obtain (sufficient) funds on the market in order to carry out that transaction. The Commission acknowledges that that risk was limited, given that the market situation from the third semester of 2009 was very favourable to the collection of money on account of the excess of available liquidity.

88 With regard to the tables presented by the Kingdom of the Netherlands in order to explain the perspective for a return on the State's investment under the initial and amended repayment terms, the Commission states that different returns can be envisaged. Thus, in the initial decision, the Commission had presented a number of options, some of which suggested a return varying between 16 and 21% per year. Even in the absence of payment of the coupon, those options still lead to an annual return of between 9.3 and 15%. Assuming that the repayment occurred at the end of the second year and where a coupon was paid every year, the return would have been around 31%, that is to say double the minimum return obtained pursuant to the amended terms. It would therefore be wrong to believe that by accepting the amended terms, the Netherlands State would by definition always have obtained a higher return than if they had obliged ING to accept the initial terms. Furthermore, the Commission observes that, in any case, there was a guarantee that the State would at some point recover the amount initially injected.

– The data produced by the Kingdom of the Netherlands

89 Fourth, to support its arguments, the Kingdom of the Netherlands presented two documents prepared by Rothschild Investment Bank. The first document is a report in which the bank states that, taking into account the movement of ING's share price, it would have been more attractive for a private investor to obtain early repayment of half of his investment with an attractive return than to hope for a theoretical return that could be greater if the option to repurchase at the price of EUR 15 per security was exercised ('the Rothschild report'). The second document reproduces the analyses prepared by the same bank on the basis of tables indicating different scenarios and also permits Rothschild Bank to conclude that the new terms would be more advantageous for the State than the initial terms ('the Rothschild analyses'). Replying to criticisms of those documents, the Kingdom of the Netherlands states that their author is competent to give its opinion on the question whether the State behaved like a private investor. In addition, those documents only assess the facts available and known when the contested decision was taken. With regard to the estimated fifty-fifty likelihood that ING would pay a dividend, it was objectively plausible and, in any case, reasonable given the difficulty of predicting whether ING would pay a dividend or not.

90 The Commission contends that the Rothschild report and the analyses came into being after the repayment terms were amended and were drafted for the purposes of the litigation. They are therefore irrelevant for determining whether the Netherlands State acted like a private investor. In addition, the Commission was not in possession of those documents when it adopted the contested decision. The factual elements contained in the reports cannot be relied upon. In addition, the Rothschild Bank states only in those documents that the amount of EUR 15 may not be considered as an 'exit price' but as a 'cap on the upside returns'. That does not detract from the fact that, if ING wanted to repurchase the securities, it was obliged to pay that amount pursuant to the initial agreement. Furthermore, the Rothschild Bank's Statement that 'it would be irrational ... for ING to exercise this option unless the ordinary share price exceeded EUR 15 ...' must be treated with a certain amount of scepticism. The Rothschild Bank states, in essence, that there would be no point in ING repurchasing half of the securities, at the end of December 2009, at a cost of EUR 11.21, because at that time the ordinary shares were considerably cheaper. That would not however have prevented ING from carrying out that transaction. The Rothschild Bank's assertion did not take sufficiently into account the fact that those securities were binding on ING and that they could not be compared to ordinary shares. In addition, the Rothschild report was not sufficiently substantiated or based on a clear methodology.

The alignment of the terms granted to AEGON and SNS Reaal

91 Fourth, the Kingdom of the Netherlands and ING observe that the Commission wrongly failed to include in its reasoning the fact that the adaptation of the repayment terms also aimed to bring those terms into conformity with those which had been agreed between the Netherlands State and other

Netherlands financial institutions, that is AEGON and SNS Reaal. If the amendment to the repayment terms could be assessed separately from the original measure and not under the private investor principle, then the Commission should have found that a measure aimed at taking away a disadvantage of a particular firm compared to other firms does not constitute State aid. That amendment simply removed the disadvantage suffered by ING under the initial agreement, that is to say the fact that ING could not repurchase the securities at a financially reasonable rate.

- 92 The Commission submits that the difference between the terms agreed with ING and those agreed with AEGON and SNS Reaal can be justified by a clear disparity in the risk profile. In ING's case, a restructuring plan was essential from the moment of the capital injection, and the redemption premium initially agreed can be regarded as a normal burden imposed on ING. Furthermore, the amendment of the repayment terms concerning ING went further than a simple alignment of those terms to those laid down for the other banks cited and enabled ING to benefit from more advantageous terms. The more advantageous repayment terms only apply, in the case of AEGON and SNS Reaal, to one-third of the capital injection, whereas in ING's case the amount is one-half. Equally, the more favourable terms were valid for AEGON and SNS Reaal only for one year, whereas the repayment by ING was finally carried out one year and one month after the capital injection.

b) The arguments concerning the obligation of diligence and the duty to state reasons

- 93 The Kingdom of the Netherlands and ING, supported by DNB, claim that the Commission infringed the obligation of diligence and the obligation to state reasons in several respects. First, the Commission did not examine how the amendment to the repayment terms could increase the amount of aid beyond the amount of the capital injection. The Commission also failed to examine whether that amendment was in conformity with the private investor principle. Second, the Commission did not hear the views of the Netherlands State or ING or even inform them of the classification of the repayment terms amendment as additional aid of EUR 2 billion. It also did not properly ask ING or the Dutch State for their views on that classification or give them an opportunity to contest it. It was only when the contested decision was adopted that the applicants, for the first time, were able to infer that the Commission considered that to provide for an additional repayment possibility amounted to additional aid. The fact that it made available a draft document regarding the facts and submitted it for comments in that regard for the period of a few hours was not sufficient. Third, the Commission did not provide adequate reasons for the contested decision with regard to its argument that the amendment to the repayment terms constituted additional State aid. The Commission did not explain why the aid measure was not evaluated as it was at the time of the decision, how a capital injection of EUR 10 billion can amount to aid of EUR 12 billion or how, assuming that the amendment to the repayment terms constitutes a separate measure, it is not in conformity with the private investor principle. In particular, the Commission considers that it stated in recitals 34 and 98 in the preamble to the contested decision, succinctly but clearly and unequivocally, that it regarded the additional possibility of repayment as additional aid. Those recitals do not however contain anything other than the finding that an additional advantage had been granted, a conclusion reached by the Commission on the basis of the incorrect premiss that ING had agreed to repay subject to payment of a '50% redemption premium'. There was no indication of how the Commission had arrived at that conclusion.
- 94 The Commission submits that it has pointed out to the Netherlands authorities on several occasions its reservations concerning the amendment to the repayment terms, inter alia to the extent that the amendment which was initially envisaged did not take into account the dilution effect that raising the necessary capital would have on the anticipated repayment. The Commission states that it also gave the Kingdom of the Netherlands the possibility of making observations on the draft statement of facts of the contested decision, which noted that the amendment would result for ING in 'an additional advantage of around EUR 1.79 to 2.5 billion'. That being said, the Commission disputes that it acted in infringement of its obligation to exercise diligence. It is clear that the grant of an additional

advantage would amount to the grant of additional State aid. Furthermore, the Commission submits that the contested decision gives sufficient reasons. It did not find in that decision that ING would repay EUR 5 billion at 150% but it is not bound to reach that conclusion. The important element was that the amendment gave ING the possibility of repaying on terms more favourable than those initially agreed. The reasoning was brief, but sufficient. With regard to the alignment of ING's position with that of other financial institutions, the Commission contends that it is obvious that the removal of a normal burden on an undertaking creates an advantage and that it was therefore not necessary for it expressly to take a position on the approach taken with regard to AEGON and SNS Reaal.

2. Findings of the Court

a) Observations on the concept of aid and on the scope of judicial review

- 95 First, with regard to the assessment of the arguments concerning substantive lawfulness, it should be recalled that Article 87(1) of the EC Treaty provides that 'any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the common market'.
- 96 It is settled case-law that classification as 'aid' within the meaning of Article 87(1) EC requires that all the conditions set out in that provision are fulfilled. Thus, for a measure to be classified as State aid there must, first, be intervention by the State or through State resources; second, the intervention must be liable to affect trade between the Member States; third, it must confer an advantage on the recipient; and fourth, it must distort or threaten to distort competition (see Case C-399/08 P *Commission v Deutsche Post* [2010] ECR I-7831, paragraphs 38 and 39 and the case-law cited). Concerning the third of those conditions, according to settled case-law, measures which, whatever their form, are likely directly or indirectly to favour certain undertakings or are to be regarded as an economic advantage which the recipient undertaking would not have obtained under normal market conditions are regarded as State aid (*Commission v Deutsche Post* paragraph 40 and case-law cited).
- 97 In order to determine such an 'advantage' in the case of a capital injection, it must be assessed whether, in similar circumstances, a private investor of a dimension comparable to that of a public authority could have been prevailed upon to make capital contributions of the same size, having regard in particular to the information available and foreseeable developments at the date of those contributions (Case C-482/99 *France v Commission*, known as '*Stardust Marine*' [2002] ECR I-4397, paragraph 70, and Joined Cases C-328/99 and C-399/00 *Italy and SIM 2 Multimedia v Commission* [2003] ECR I-4035, paragraph 38). In its *Stardust Marine* judgment, the Court stated that, in order to examine whether or not the State has adopted the conduct of a prudent investor operating in a market economy, it is necessary to place oneself in the context of the period during which the financial support measures were taken in order to assess the economic rationality of the State's conduct, and thus to refrain from any assessment based on a later situation (*Stardust Marine*, paragraph 71).
- 98 Such principles apply on the assumption that, as in the present case, having decided to subscribe to capital issued by an undertaking subject to certain repayment terms, the State agrees to amend those terms. In such circumstances, State aid may have been granted both on the making of the capital contribution, which necessarily includes information concerning the terms of a possible later repayment or payment of remuneration for that capital, and on the amendment to the repayment terms, if it becomes apparent that the State did not act in each of those situations as a private investor in a similar situation would have done. The comparison of the behaviour of the State with that of a private investor must be carried out taking into consideration the information available and foreseeable developments at the date of those measures. In order to assess the Commission's analysis

of the economic rationality of the behaviour of the State in the present case, it is necessary to place oneself in the context of the period during which the financial support measures were taken, that is, in the present case, autumn 2008 for the capital injection and laying down of the initial repayment terms and autumn 2009 for the amendment to the repayment terms, respectively. In that regard, it should be noted that it is settled case-law that the lawfulness of a decision concerning State aid is to be assessed in the light of the information available to the Commission when the decision was adopted (see Case C-390/06 *Nuova Agricast* [2008] ECR I-2577, paragraph 54, and the case-law cited).

- 99 Consequently, the assertion made by the Commission that the amendment to the repayment terms could not or should not be assessed pursuant to the private investor test – because that amendment, being granted shortly after the capital injection, was to be regarded as ‘*an additional measure in favour of the recipient of State aid which is being restructured*’ (see paragraph 87 above) – must be rejected. In the light of the reasoning in paragraph 98, the Commission cannot evade – as it proposes – its obligation to assess the economic rationality of the amendment to the repayment terms in the light of the private investor principle solely on the ground that the capital injection subject to repayment already itself constitutes State aid. It is only after such an assessment that the Commission is in a position to conclude whether an additional advantage within the meaning of Article 87(1) EC has been granted.
- 100 Second, with regard to the extent of judicial review of the contested decision in the light of Article 87(1) EC, according to the case-law that the concept of State aid, as set out in that provision, is a legal concept which must be interpreted on the basis of objective factors. For that reason, the European Union judiciary must in principle, having regard both to the specific features of the case before them and to the technical or complex nature of the Commission’s assessments, carry out a comprehensive review as to whether a measure falls within the scope of Article 87(1) EC (Case C-83/98 P *France v Ladbroke Racing and Commission* [2000] ECR I-3271, paragraph 25, and Case C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, paragraph 111).
- 101 Admittedly, the Court has also held that judicial review is limited with regard to whether a measure comes within the scope of Article 87(1) EC, where the appraisals by the Commission are technical or complex in nature (see Case C-56/93 *Belgium v Commission* [1996] ECR I-723, paragraphs 10 and 11, and *British Aggregates v Commission*, cited in paragraph 100 above, paragraph 114). It is however for the Court to decide whether that is the case (see, to that effect, *British Aggregates v Commission*, cited in paragraph 100 above, paragraph 114).
- 102 In that regard, it should also be noted that although, in the area of State aid, the Commission enjoys a broad discretion the exercise of which involves economic assessments which must be made in a European Union context, that does not imply that the European Union judiciary must refrain from reviewing the Commission’s interpretation of economic data. According to the case-law of the Court, not only must the EU judiciary establish, among other things, whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it (see Case C-290/07 P *Commission v Scott* [2010] ECR I-7763, paragraphs 64 and 65).
- 103 However, when conducting such a review, the European Union judiciary must not substitute its own economic assessment for that of the Commission. The review by the European Union judiciary of the complex economic assessments made by the Commission is necessarily limited and confined to verifying whether the rules on procedure and on the statement of reasons have been complied with, whether the facts have been accurately stated and whether there has been any manifest error of assessment or misuse of powers (see *Commission v Scott*, cited in paragraph 102 above, paragraph 66, and case-law cited).

- 104 In that context, by way of example, the Court has held that, in order to determine whether the sale of land by the public authorities to a private individual constitutes State aid, the Commission must apply the private investor test, to determine whether the price paid by the presumed recipient of the aid corresponds to the price which a private investor, operating in normal competitive conditions, would be likely to have fixed. As a rule, the application of that test requires the Commission to make a complex economic assessment (*Commission v Scott*, cited in paragraph 102 above, paragraph 68, and case-law cited).
- 105 In the present case, the question whether the amendment to the repayment terms constitutes State aid, in so far as it grants an advantage to the recipient having regard to the definition set out in paragraph 96 above, is thus subject, in principle, to comprehensive review by the Court. Assuming however that the Court were to take the view that the identification of the aid called for a complex economic assessment by the Commission, in particular regarding the question whether, by accepting the amendment to the repayment terms, the Netherlands State acted as a prudent private investor of a comparable dimension would be likely to have acted, such a question is subject to limited review according to the rules set out in paragraph 102 above.
- 106 Thus, to assess the lawfulness of the contested decision in the light of the abovementioned principles, it is necessary to take into account the information at the Commission's disposal or available to it on 18 November 2009, the date on which it adopted the contested decision. In that regard, if it should prove to be the case that the Commission's assessment is contradicted or placed in doubt by information of which it was unaware during the administrative procedure, it must be established whether such information could have been known to and taken into consideration by it at the appropriate time and, if that were the case, whether that information should as a matter of course have been considered by the Commission, at least as relevant data in order to apply the private investor test (see paragraphs 102 to 104 above).
- 107 Third, with regard to the appraisal of the arguments concerning the lawfulness of the contested decision on procedural grounds, it should be noted that the Kingdom of the Netherlands and ING refer, in a general manner, to a number of guarantees conferred by the European Union legal order in administrative proceedings, in particular when they may lead to a decision having mandatory legal effects such as to affect the interests of the parties covered by the decision. Those guarantees include the requirement that the Commission examine, carefully and impartially, everything relevant to the particular case, and the rights of the person concerned to put forward his point of view before the decision is taken and to have sufficient reasons given for the decision. Where the Commission enjoys a broad power of appraisal, respect for those guarantees is of even more fundamental importance (Case C-269/90 *Technische Universität München* [1991] ECR I-5469, paragraphs 13 and 14; Case T-167/94 *Nölle v Council and Commission* [1995] ECR II-2589, paragraph 73; see also Article 41 of the Charter of Fundamental Rights of the European Union (OJ 2007 C 303, p. 1) and, concerning State aid, Case C-525/04 P *Spain v Lenzing* [2007] ECR I-9947, paragraph 58).
- 108 In particular, the Commission is required, in the interests of sound administration of the rules relating to State aid, to conduct a diligent and impartial examination of the evidence at its disposal (see, inter alia, Case C-367/95 P *Commission v Sytraval and Brink's France* [1998] ECR I-1719, paragraph 62).
- 109 It is in the light of those principles that it must be examined whether the Commission correctly established, in recital 98 in the preamble to the contested decision, that the amendment to the capital injection repayment terms resulted in a supplementary advantage for ING, that is to say additional aid of approximately EUR 2 billion.

b) Assessment of the reasoning in the contested decision concerning the amendment to the repayment terms

- 110 It follows from paragraphs 97 to 99 above that, in the present case, the Commission could not limit itself to finding that the amendment to the capital injection repayment terms constituted State aid without first examining whether the amendment conferred on ING an advantage to which a private investor placed in the same situation as the Netherlands State would not have agreed, an examination which presupposed in particular a comparison of the initial repayment terms with the amended terms.
- 111 For the purposes of that examination, the Commission was bound to take into account all the relevant information and, in particular, that concerning the initial repayment terms and the amended terms. That information comprised inter alia the following: first, the fact that the initial terms do not lay down an obligation but only an option for ING to repurchase the securities subscribed for by the Netherlands State within the three-year period provided for in that regard; second, the fact that those initial terms guarantee the State merely an annual return equal to the interest earned; and third, the fact that, under the amended terms, the State ensured that it would receive an annual 15% return.
- 112 It is not however apparent from the contested decision that the Commission carried out the comparison referred to in paragraph 110 above. The Commission rather limited itself to stating that the amendment to the repayment terms resulted in a loss of resources for the Netherlands State.
- 113 In recital 98 in the preamble to the contested decision, the Commission classified the existence of additional aid — an assessment the lawfulness of which is contested by the Kingdom of the Netherlands and ING — by stating, first, that '[t]he amendment of the redemption premium also constitutes State aid in so far as the State waives its right to obtain revenues' and, second, that that 'results in an additional benefit for ING [which] represents additional aid of approximately EUR 2 billion'. That classification as additional aid by the Commission is based, in essence, on the supposed requirement that ING comply with the initial terms in the event of early repayment in order to determine the remuneration owing to the State. Under the initial terms, early repurchase of ING securities to the value of EUR 500 million would necessarily entail the receipt by the Kingdom of the Netherlands of a premium of EUR 2.5 billion, that premium being higher than that paid on the basis of the amended terms. That idea is present in recital 34 in the preamble to the contested decision as follows '[i]n other words, considering that ING would normally have to pay EUR 2.5 billion redemption premium [the] amendment [of the repayment terms] would result in an additional advantage for ING between EUR 1.79 and 2.2 billion depending on the market price of ING shares', and taken up again in recital 98 in the preamble to the decision, in which it is stated that '[a]s ING has already agreed to a redemption premium of [50% (not 150%: see recital 33 in the preamble to the decision)] any reduction is indeed forgone revenue'.
- 114 Consequently, the amendment to the repayment terms leads, according to the Commission, to a loss of revenue for the Netherlands State, equivalent to additional aid, of an amount equal to the difference between the sum initially provided for under the initial terms and the sum to be paid under the amended terms. In order to assess the compatibility of aid in the light of Article 87(3)(b) EC, in particular the restructuring aid referred to in Article 2 of the contested decision, the Commission thus took into account the existence of additional aid of approximately EUR 2 billion.

Legal analysis of the amendment of the repayment terms

- 115 However, it must be pointed out that the amendment to the repayment terms did not lead as a matter of law to a loss of revenue for the Netherlands State, in so far as the State did not renounce a guaranteed return but the simple possibility of receiving, in relation to part of the subscribed-for securities, a very high maximum annual return (more than 50% annually).

- 116 In that regard, it must be pointed out that, in order to establish the existence of additional aid, the Commission had to base itself on the premiss that the initial terms were the only ones which could apply in the event of reimbursement (see paragraph 113 above). The initial terms specified in that regard that, in the case of repurchase by ING of the securities issued when the capital injection took place, they would be repurchased at EUR 15 per security. However, it is clear from the text of the initial agreement itself that the Kingdom of the Netherlands could not compel ING to repay — let alone to repay early — to that State half the capital injection including a redemption premium of 50% compared to the issue price of EUR 10 stipulated by it (see paragraph 4 above) as expressly acknowledged by the Commission in its written pleadings (see paragraph 82 above) and at the hearing, as recorded in the minutes. On the basis of the initial terms, the possibility of repaying the capital contributed in the course of the first three years was offered to ING alone, which remained free to exercise or not to exercise the option as it thought fit. It follows that only the amended terms gave the Netherlands State the certainty of reimbursement of part of the capital sum contributed in the three years provided for to that end. The initial terms, on the other hand, offered no such certainty.
- 117 In addition, it must be noted that it was only in its written pleadings (see paragraphs 87 and 88 above) that the Commission submitted that it is not in dispute that the initial repayment terms could lead to a return of 31%, for example, assuming that repayment took place at the end of the second year and if a coupon were paid every year, and that, therefore, no investor would have accepted repayment without claiming the returns initially provided for. Moreover, the Commission contends that it is wrong to point to the uncertainties of repayment, since ING had always stated that it would repay as soon as possible. Those explanations led the Commission to state in its written pleadings that ING was obliged to repay on the terms initially agreed in that regard. Assuming that the Kingdom of the Netherlands and ING agree on the early repayment of part of the capital injection on terms other than those initially provided for, the Commission would therefore have no choice but to impose on ING payment of the premium initially agreed by means of the additional aid classification. No other repayment scenario could be envisaged than that laid down in the initial agreement. According to the Commission, no private investor would have given up the best that he could have hoped for.
- 118 In that context, following the Commission's reasoning, the repayment method for a loan concluded between two parties at a given time could no longer subsequently be altered, whether, for example, to take into account movements in or the stagnation of stock market prices, the return of liquidity on financial markets or the end of a panic reaction. Such an approach, which limits itself simply to the observation that the initial terms have been amended, cannot suffice for the classification as aid pursuant to Article 87(1) EC since it completely disregards both the option — and not the right — of the Netherlands State to be repaid on the basis of the initial terms, and the economic rationality which may explain the amendment that was made.
- 119 In that regard, it must be pointed out that, first, the absence of any examination in the contested decision of the economic rationality of the amendment to the repayment terms from the perspective of a private investor in a situation comparable to that of the Netherlands State is all the more unacceptable since, in the initial decision, the Commission had referred to various factors relevant to such an examination in the context of the assessment, in the light of Article 87 EC, of the aid granted in the form of the capital injection at that stage of the administrative procedure. Thus, it is apparent that the minimum internal rate of return envisaged and obtained under the amended terms (15%, the proposed range being between 15% and approximately 22%, see paragraph 85 above) was higher than the rate referred to by the Commission in its initial decision when it envisaged the remuneration due

by ING to the Netherlands State as consideration for the capital injection, that being a range between 'more than 10%' but less than '15% or more'. In recitals 63 to 67 in the preamble to the initial decision, the Commission stated in that regard that:

- (63) Recent data show that, reflecting current distressed market conditions, the current yield for hybrid Tier 1 capital is in the vicinity of 15% or more. The Commission acknowledges that setting the remuneration as high as the current clearing level would restrain the banks from using such measures. Moreover, it is the Commission's intention to adjust to long term market conditions and not to impose the current unfavourable conditions on the banks today. In addition, in recent decisions on the recapitalisation schemes in the UK and Germany, the Commission accepted, in the context of strict behavioural conditions, remuneration levels of 12% and 10% respectively.
- (64) Therefore, in view of the specificities and in particular the risk profile of the securities, the Commission considers that an expected overall return of in excess of 10% would be required in the present case.
- (65) The Dutch authorities consider that there is a high likelihood that such return will materialise through a combination of coupons at 8.5% (possibly more depending on the level of dividends paid out), the conversion possibility in ordinary shares or the repurchase option by ING at a level of 150% (EUR 15 per security). The latter level is considered the appropriate minimum level by the Commission in the present circumstances. Indeed, the Dutch authorities have submitted various scenarios showing that the possible return can be considerable, depending largely on the performance of the Dutch and global economy and hence ING's future stock performance. As regards the payment of coupons, assuming that the company's financial performance recovers and its share price goes over EUR 15 within the next 3 years, ING will likely pay out some dividend within the next three years. As regards the repurchase option, the higher the company's share price above the EUR 15 threshold, the stronger the incentive for the shareholders to redeem the instrument. This incentive is based on the fact that [, first,] under this scenario, the instrument is always more expensive than common equity and [, second,] if the share price sits materially above EUR 15, there will be an added incentive for ING, on behalf of its shareholders, to remove any perceived dilution overhang linked to the fact that the instrument is convertible into common equity.
- (66) Under this scenario, in the event that the company redeems the instrument after 3 years (and assuming dividends are paid every year but that the State only receives the 8.5% coupon), then the total returns generated by the State would be 22.1% per annum. If redemption was to occur after 5 years, returns would drop down to 16% per annum, in the event that no dividend were to be paid during the relevant period, the returns would drop respectively to 15.9% and 9.3%.
- (67) Taking points (65) and (66) into account, the Commission considers that the expected return on the State's investment is likely to be in excess of 10%. It recalls that it is the nature of deeply subordinated tier 1 capital that some uncertainty to the return remains and it is exactly for this reason as well as in view of the type of instrument that the expected return should be above 10%. It also notes positively the commitments of ING and the Dutch authorities set out in point (31) regarding the payment of dividends. [Point 31 states: "The Dutch authorities have committed to use their best endeavours to achieve an overall return on the securities of at least 10%. The Dutch authorities consider that there is a high likelihood that such remuneration will materialise through a combination of coupons at 8.5% (possibly more depending on the level of dividends paid out), and the repurchase option. ING has also declared that it shall maintain its existing dividend policy."] As an additional safeguard, the Commission also notes that the Dutch authorities have committed to re-notify, as set out in point (32), in the event that the expected return does not occur, although the Commission accepts that the return cannot be certain.'

- 120 According to the reasoning contained in recitals 63 to 67 in the preamble to the initial decision, certainly when analysing the compatibility of the aid in question and not the application of the private investor principle, the Commission was perfectly aware, at that stage of the procedure, of the different options under the initial agreement and of the probabilities in that regard concerning the various scenarios which could be foreseen. A 31% return as referred to by the Commission in its written pleadings clearly constitutes a maximum, and in no sense an inviolable or irrevocable clause or the only basis on which to assess the expected return.
- 121 Furthermore, it is also apparent from the assessment carried out by the Commission in the initial decision that it considered in November 2008 that ‘reflecting the current distressed market conditions’, the current yield attained by the market for securities of the type issued at the time of the capital injection was ‘15% or more’. That return was considered by the Commission to be excessive and it indicated its satisfaction at that stage with a return of ‘more than 10%’. It follows that the Commission took into account the fact that private investors could be attracted by such securities. All the more so, it cannot be ruled out that such investors could still have been interested in such securities in November 2009, when the financial crisis was less strongly felt and it was possible to believe that the market return could have been lower, as acknowledged by the Commission.
- 122 In that regard, the Commission did not carry out an examination in the contested decision to determine how a return of between 15% and 22% in favour of the Netherlands State following the amendment to the repayment terms did not correspond to that which could reasonably be expected by a private investor confronted by a similar situation, that is to say a holder of securities of the type issued at the time of the capital injection which can be repaid by the issuer.
- 123 Second, with regard to the relevant data submitted by the applicants in the course of the proceedings, inter alia with regard to the various returns expected and the behaviour of a private investor of reference as explained in the Rothschild report and the Rothschild analyses, that is information already held by the Commission or which was available to it when it adopted the contested decision. In fact, the Commission refused to take such factors into consideration, even hypothetically, because its reasoning was based on the false factual premiss that, in the event of repayment, only the initial terms applied, meaning that the Netherlands State thereby enjoyed a specific right to obtain revenues. In the present case, the Commission was bound to take into account and to assess such information, in the context of the examination of the existence of an advantage linked to the amendment to the capital injection repayment terms, in particular information suggesting it was possible that a private investor could be encouraged to substitute a certain outcome for an uncertain one and obtain in that regard a fixed and satisfactory return in the place of one that could not be predicted. The Commission could not therefore adopt the contested decision without taking such information into consideration and examining its effect on its assessment of the aid (see paragraph 99 above).
- 124 In that regard, the Commission cannot claim that it enabled the Kingdom of the Netherlands and ING to produce such information in the course of the administrative procedure on the basis that it allowed them to comment on the factual part of a draft decision. The Commission may not reasonably maintain that the fact that it gave them a few hours to comment, on 6 November 2009, on the description of the facts on which it intended to rely in the contested decision can be judged sufficient to allow such information to be produced. Not only was the time given to respond much too short, but neither the Kingdom of the Netherlands nor ING could know, at that stage, that the Commission did not intend to refer to the private investor test in order to assess the existence of aid concerning the amendment to the repayment terms. In particular, the Commission did not state, in that document, why it thought the Netherlands State had the ‘right to obtain’ revenue or why ING was obliged to pay such a sum in the case of early repayment and it failed to address the consequences to be drawn from the estimated return which was known to the Commission under the new repayment terms. The Commission also failed to respond to the argument concerning equal

treatment raised by Netherlands State at the time of the communication of the amendment to the repayment terms, when it stated that the effect of the amendment to the repayment terms was to offer ING exit terms similar to those granted to AEGON and SNS Reaal.

- 125 Consequently, the Commission misinterpreted the concept of aid by not assessing whether, by accepting the amendment to the repayment terms, the Netherlands State acted as a private investor would have done in a similar situation, inter alia because the Netherlands State could have been repaid early and because when the amendment occurred it obtained a greater certainty of being repaid in a satisfactory manner taking the existing market conditions into account.

Factual analysis of the amendment to the repayment terms

- 126 A loss in revenue also cannot be proved by the Commission by claiming that ING was *de facto* obliged to repurchase some of the securities under the initial repayment terms, even if there was no legal obligation to do so, an argument for which there is no support in the contested decision.
- 127 In addition, the grounds relied upon by the Commission, for the first time, before the Court to prove that ING was *de facto* obliged to repurchase some of the securities created when the capital was increased 11 November 2008 under the initial repayment terms are unconvincing and they are contradicted by the more persuasive explanations of the Kingdom of the Netherlands, ING and DNB.
- 128 In that regard, the Kingdom of the Netherlands and ING set out in a convincing manner the reasons why ING did not exercise the repayment option which was proposed to it under the initial agreement as long as ING's share price did not come significantly close to EUR 15 (see, in particular, paragraph 86 above)
- 129 The main bulk of that information, that is to say the information concerning the movement of ING share prices on the stock market until the day on which the contested decision was adopted, that is 18 November 2009, together with the predictions regarding the short-and medium-term share price movements then made by stock market analysts, was available when the Commission set out the factual framework to take into account in order to assess the additional aid. The Commission was not permitted to disregard that information because the ING share price and its likely movement at that time were relevant to the assessment of the importance of the initial terms for the appraisal of the alleged existence of the 'right to obtain revenues' and of additional aid granted when the repayment terms were amended.
- 130 On the basis of that information, the Kingdom of the Netherlands and ING claim that it was not rational for ING to purchase the securities issued when the capital injection was made, subject to the redemption premium as laid down in the initial terms, if the ING share price was lower than EUR 15. That assertion is substantiated inter alia by a memorandum prepared by Goldman Sachs Investment Bank for ING on 12 May 2009, which presents the possible scenarios and the advantages they present for ING, inter alia regarding the threshold role played by the share price of EUR 15 which operates as the repayment trigger under the initial terms. The table showing the ING share price between September 2008 and May 2010, communicated by the Kingdom of the Netherlands in response to the Commission's arguments, also proves that the share price was always significantly lower than EUR 15, at least until 18 November 2009, the date on which the contested decision was adopted. That information is not called into question by the Commission argument alleging the need to take into account the dilution effect linked to the share issue required to obtain the funds necessary for early repayment on the ING share price, as is apparent from the table communicated in that regard by the Kingdom of the Netherlands which shows that, in any case, the threshold required in order to obtain such funds at rational economic conditions was never attained.

- ¹³¹ In addition, with regard to the probable movements of ING shares at the time of adoption of the Commission's contested decision, ING refers to various reports by analysts published at the end of October 2009, according to which the target price of ING shares in twelve months varied from EUR 9 for Nomura, to EUR 12.90 for the Bank of America Merrill Lynch, with all the other analysts, namely Citi, Deutsche Bank, KBW, Morgan Stanley and UBS, predicting a target price of between EUR 10.60 and EUR 11.50, that is to say well below the EUR 15 threshold. The Commission does not dispute that data as such.
- ¹³² Moreover, the Kingdom of the Netherlands and ING claim that the repayment in 2009 of the securities issued at the time of the capital injection on the basis of the initial terms would have required ING to undertake a share issue, because it did not at that time have funds available to redeem those securities. It would therefore have been illogical to issue shares priced lower than EUR 15 in order to redeem securities valued at EUR 15. It would only be considerably later that ING could have repaid the securities issued using retained profits — and still on the condition of not paying dividends — or sales proceeds.
- ¹³³ The Commission's arguments disputing the relevance of that information cannot succeed (see paragraphs 82 and 87 above). Thus, the fact that ING's share price reached EUR 43 around 2001 cannot suffice to defeat the arguments based on the actual movement of the price of that share on the stock market at the beginning of the 2008 financial crisis until adoption of the contested decision and on the analysts' papers discussing the predicted share movements at the time. Equally, the observations relating to ING's stated intention of repaying if possible cannot have the effect of negating the legal effect of the option conferred on ING and its interest in exercising it having regard to the actual movement of the share price on the stock market, on which the cost and therefore the possibility of repayment on the basis of the initial terms depended. Furthermore, the declarations of intention cited by the Commission are evidence only of what is stated therein, that is that, if possible, ING will repay. Such a decision however forms part of a body of objective and rational data relied on by the applicants on that point, the genuineness of which cannot be denied by the Commission, as it does in the contested decision on the basis of a false premiss.
- ¹³⁴ With regard to the foregoing considerations, it should be held that ING would only have exercised the option permitting it to repay the amount of the capital injection in the course of the first three years in specific economic circumstances which did not and were not likely to occur in the light of the share price and the foreseeable movement of the ING share price in autumn 2009. Given that the Commission failed to examine the whole body of relevant data to be taken into consideration in the evaluation of the existence of the 'right to obtain revenues of EUR 2.5 billion' in the event of early repayment, the contested decision is therefore defective in that regard.
- ¹³⁵ In any case, even if the Commission could have concluded that the State had suffered a loss of revenue, it did not correctly determine the amount of that alleged loss of revenue. Thus, on a reading of the arguments of the Kingdom of the Netherlands and the Commission in that regard (see paragraphs 83 and 84 above), it is apparent that, in its evaluation of the amount of additional aid, the Commission failed to take into consideration another piece of information relevant to the analysis of the concept of State aid. Following the amendment to the repayment terms, payment of a coupon representing the interest accrued at the time of the early repayment no longer depended, as was the case under the initial repayment terms, on payment of a dividend to ordinary shareholders. The Netherlands State thus obtained the right to a sum of money which it did not necessarily enjoy beforehand, since the acquisition of that right was conditional on ING's decision whether to pay a dividend.
- ¹³⁶ When the Commission adopted the contested decision, on 18 November 2009, it was aware of that information, which was evident from the amended terms themselves. In addition, from the moment the Commission decided to proceed by way of comparison between the two versions of the repayment terms, it was for it to take into account the differences between those versions in order to determine the existence of aid in the light of Article 87(1) EC (see paragraph 111 above). The Commission was

not permitted to disregard the difference in question, that is the unconditional payment of a coupon representing the interest accrued at the time of early repayment, since that difference was conclusive for the assessment of the question whether the amendment to the repayment terms implied the grant of an additional advantage to ING. Furthermore, the Commission was reasonably able in good time to obtain part of the relevant information in order to analyse the amendment to the repayment terms, which was communicated by ING to the public in its press release of 12 August 2009 concerning the results obtained in the third trimester of 2009, in which it was stated that ING had decided not to pay the interim dividend on ordinary shares for the year 2009.

- 137 In that regard, the Commission's arguments that the difference was not specifically brought to its attention by the Netherlands State or that its error was not identified on the reading of the draft factual statement communicated on 6 November 2009 (see paragraph 84 above) cannot be accepted. As already stated in paragraph 136 above, that difference constitutes, according to the approach of the Commission itself, an intrinsic element of the concept of advantage laid down in Article 87(1) EC, in the light of which the Commission is bound to classify the facts taking into account all the relevant data in that regard. Furthermore, as the Kingdom of the Netherlands observes, it was not in a position to assess the nature of the Commission's analysis as it was unaware both of the classification which it intended to give to the repayment terms amendment and the proposed reply by the Commission to the arguments which it had presented during the administrative procedure in order to explain that amendment.
- 138 The Commission, not having requested, contrary to its obligation referred to in paragraph 107 above, supplementary information in that regard, as it did initially for the capital injection measure, and not having opened the formal examination procedure laid down in Article 88(2) EC, in the event that the amendment to the repayment conditions created doubts as to its compatibility with the common market, as had been the case for the impaired assets measure, cannot criticise the applicants for not having furnished it with all the information relevant to the abovementioned difference. In any case, the error committed in that regard could only have been pointed out by the Kingdom of the Netherlands and ING after the adoption of the contested decision.
- 139 In the present case, as no dividend was paid by ING for the year 2009, the Netherlands State was granted under the amended terms, in comparison with the initial terms, the sum of EUR 258.5 million when the early repayment occurred on 21 December 2009. Although the Commission could not have known that amount when it adopted the contested decision, it should certainly have enquired as to the effect that the possibility of such a payment could have on the amount of additional aid referred to in the contested decision. Equally, for the reasons correctly set out by the Kingdom of the Netherlands, the Netherlands State could not have claimed payment of the coupon in the event of early repayment in 2009 on the basis of the initial terms, because ING had not paid the dividend for that exercise (see paragraph 83 above).
- 140 Consequently, even supposing that the classification as additional aid by the Commission is correct, the 'loss of revenues' for the Netherlands State as a result of the amendment of the repayment terms cannot amount to approximately EUR 2 billion, that is to say a sum between EUR 1.79 and 2.2 billion, as is stated in the contested decision, but must necessarily be lower than that, reduced in proportion to the interest accrued when the repayment was made.
- 141 Finally, contrary to what is alleged by the Commission (see paragraph 84 above), the difference between the two sums cannot be irrelevant in the present case, since the Commission intended itself to fix the amount of the aid in the contested decision. That difference is likely to constitute a sum which is, in itself, important and significant, possibly amounting to several hundred million euros. Therefore, it is not possible to rule out the assumption that the taking into account of such remuneration, provided for only in the amended terms, could have affected the Commission's assessment, both concerning the classification of aid under Article 87(1) EC and the examination of

its compatibility with the common market under Article 87(3)(b) EC, in particular for the purposes of the appraisal of ING's contribution or the scope of the measures intended to remedy the distortions of competition.

142 Thus, the contested decision contains an error of fact, which invalidates the Commission's assessment of the concept of aid. The consequences of that error for the Commission's assessment of the compatibility of the aid in question with the common market will be examined below in paragraph 147 et seq.

Conclusion on the classification as additional aid

143 The above considerations show that, in the absence of proof by the Commission in the contested decision that the amendment of the repayment terms constituted an advantage for ING which a private investor in the same situation as the Netherlands State would not have granted and because the Commission erred as to the amount of that advantage, the contested decision is invalidated to the extent that it is based, for the reasons set out in recital 98 in the preamble to that decision, on the finding that the amendment to the capital injection repayment terms constitutes additional aid of approximately EUR 2 billion.

144 Consequently, the plea in law alleging infringement of Article 87(1) EC must be accepted, it being unnecessary to reply to the other arguments relied on by the Kingdom of the Netherlands and ING in that context.

145 It is however necessary to make provision for the consequences of such a defect, affecting the grounds of the measure, on its operative part.

B – Consideration of the consequences of the defect affecting the grounds of the contested decision on its operative part

146 In order to assess the implications of the defect which affects the contested decision in so far as it is based, for the reasons stated in recital 98 in the preamble to that decision, on the finding that the amendment to the capital injection repayment terms contains additional aid of approximately EUR 2 billion, it should be recalled that the operative part of an act is indissociably linked to the statement of reasons for it, so that, when it has to be interpreted, account must be taken of the reasons which led to its adoption (Case C-355/95 P *TWD v Commission* [1997] ECR I-2549, paragraph 21, and Joined Cases T-204/97 and T-270/97 *EPAC v Commission* [2000] ECR II-2267, paragraph 39). Although only the operative part of a decision is capable of producing legal effects, the fact remains that the assessments made in the grounds of a decision can be subject to judicial review by the judicature of the European Union to the extent that, as grounds of a measure adversely affecting the interests of those concerned, they constitute the essential basis for the operative part of that measure or if those grounds are likely to alter the substance of what was decided in the operative part (see Joined Cases T-81/07 to T-83/07 *KG Holding and Others v Commission* [2009] ECR II-2411, paragraph 46 and the case-law cited).

147 In that context, it should be noted that, in the present case, the Kingdom of the Netherlands seeks the annulment of the contested decision which is, inter alia, based on the finding, stated in recital 98 in the preamble to that decision, that the amendment to the capital injection repayment terms contains additional aid of approximately EUR 2 billion, whereas, in its first head of claim, ING, supported by DNB, seeks, in essence, the annulment of the first paragraph of Article 2 of the contested decision, the second paragraph of Article 2 of and Annex II to that decision, in so far as the Commission considered that the amendment to the repayment terms constitutes additional aid of approximately EUR 2 billion.

148 The examination of those requests for annulment means that it is necessary to determine the consequences for the operative part of the errors made by the Commission when it found in the contested decision that the amendment to the repayment terms constituted additional aid of approximately EUR 2 billion, leading to a distinction between the effect of those errors on, first, the first paragraph of Article 2 of the contested decision and, second, the second paragraph of Article 2 of and Annex II to that decision.

1. Lawfulness of the first paragraph of Article 2 of the contested decision

149 In that regard, it is apparent from the grounds of the contested decision, and in particular from recital 98 in the preamble to that decision, that the Commission found that, when the repayment terms were amended — as communicated by the Kingdom of the Netherlands during the administrative procedure — the Netherlands State had granted ING ‘additional aid of approximately EUR 2 billion’.

150 Subsequently, that additional aid was taken into account by the Commission when it determined the total amount of aid implemented by the Kingdom of the Netherlands for ING’s illiquid assets back facility and restructuring plan (‘the restructuring aid’). In recital 106 in the preamble to the contested decision, which rounds off the assessment of the existence of aid having regard to Article 87(1) EC, the Commission stated that ‘[i]n total, therefore, ING will receive restructuring aid of up to EUR [12 to 22] billion in liquidity guarantees and about EUR 17 billion of other aid, amounting to about 5% of RWA of the ING Bank’.

151 In reply to the Court’s written questions, the Commission explained that it was only the EUR 17 billion of other aid which constituted about 5% of RWA of the ING Bank; the guarantees granted or to be granted were not taken into consideration at that stage of the reasoning. Those replies to the written questions also made it possible to determine that that sum of EUR 17 billion was made up as follows: first, the amount of aid equivalent to the sum of the injected capital, that is to say EUR 10 billion, as stated in recital 97 in the preamble to the contested decision; second, the amount of aid concerning the amendment to the repayment terms, that is to say approximately EUR 2 billion, as stated in recital 98 in the preamble to the contested decision; and third, the amount of aid linked to the impaired assets measure, that is to say EUR 5 billion, as stated in recital 99 in the preamble to the contested decision.

152 Those clarifications make it possible to interpret the concept of ‘restructuring aid’ referred to in the first paragraph of Article 2 of the operative part of the contested decision, according to which ‘[t]he restructuring aid provided by the Netherlands to ING constitutes State aid within the meaning of Article 87(1) [EC]’. It is clear from the foregoing that the additional aid is a constituent element of the restructuring aid referred to in that provision, which does not distinguish between the different elements of that aid.

153 Consequently, taking into account the errors which mar the classification as additional aid made in the contested decision, the first paragraph of Article 2 of the contested decision must be annulled in its entirety, since it is based, for the reasons set out inter alia in recital 98 in the preamble to the contested decision, on the finding that the amendment to the repayment terms constitutes additional aid of approximately EUR 2 billion.

2. Lawfulness of the second paragraph of Article 2 of and Annex II to the contested decision

154 Following the first paragraph of the operative part of the contested decision, which classifies all restructuring aid granted by the Kingdom of the Netherlands to ING as State aid within the meaning of Article 87(1) EC, the second paragraph of that provision states that ‘[this] aid is compatible with the common market, subject to the commitments set out in Annex II’, that annex stating at the outset

that, '[a]s regards the restructuring aid the following commitments have to be respected'. The additional aid, which is a constituent element of the restructuring aid, is thus an integral part of the Commission's assessment when it rules on the compatibility of that aid with the common market.

- 155 That conclusion is confirmed by the grounds of the contested decision. In recital 141 in the preamble to the contested decision, in the part concerning the assessment of the compatibility of the restructuring aid in the light of Article 87(3)(b) EC, reference is made to the 'significant aid amount, representing 5% of RWA if expressed in terms of RWA of ING Bank[; that] level is well above the "trigger level" of 2% of RWA', in order to evaluate the amount of aid and the resulting distortions. That reference to the threshold of 5% of RWA shows that the Commission took into consideration the sum of EUR 17 billion previously referred to in recital 106 in the preamble to the contested decision (see paragraphs 150 and 151 above). Equally, the Commission stated in recital 157 in the preamble to the contested decision that 'the additional aid measures presented in the framework of the restructuring plan, that is to say the modification of the terms of the repurchase of the Core Tier 1 securities from the Netherlands and the foreseen liability guarantees, should also be declared compatible with the common market pursuant to Article 87(3)(b) of the Treaty, given the depth of the measures for addressing market distortions presented in the restructuring plan and the fact that the aid helps the beneficiary to enhance its viability' and that '[t]his also concerns the aid deriving from the changed terms of the repayment arrangements of the capital granted by the Netherlands'.
- 156 On reading the operative part and the grounds of the contested decision, it therefore proves impossible to dissociate the additional aid from the operative part and the underlying grounds when it comes to examining the assessment carried out by the Commission with regard to both the compatibility of the aid with the common market and the determination of the level of commitments required so that the aid can be declared compatible with the common market.
- 157 In that regard, it is apparent from the replies to the written questions posed at the hearing that the parties disagree about the consequences which the annulment applied for could have on Annex II to the contested decision, which contains the commitments to be respected so that the restructuring aid referred to in Article 2 of that decision could be declared compatible with the common market. It must first of all be noted that the Kingdom of the Netherlands stated clearly that it was of the view that the annulment sought by it was indeed capable of causing the compensatory measures provided for in Annex II to the decision to lapse, since that decision is based inter alia on the taking into account of the amount of additional aid. Second, according to the Kingdom of the Netherlands, ING and DNB, there is an essential and proportionate relationship between the amount of restructuring aid granted by the State and the extent of the measures put forward in order to remedy the distortions to competition caused by that aid. By contrast, the Commission considers that the deduction of EUR 2 billion from the restructuring aid — which, in order to assess the compensatory measures required to remedy the distortions of competition, mainly takes into account the EUR 10 billion capital injection aid and the EUR 5 billion aid granted as an impaired assets measure — would have no effect on the extent of the measures put forward in order to remedy the distortions of competition caused.
- 158 The last mentioned approach cannot be accepted by the Court in order to determine the consequences of the annulment requested on the contested decision. Even if the extent of the compensatory measures depends, in principle, directly and proportionately, on the aid granted, the assessment of which is invalidated in the present case to an appreciable extent, it is clear from the contested decision that the Commission examined that question in the light of the effects of the restructuring aid made up of the capital injection aid, the aid concerning the amendment to the repayment terms and the aid linked to the impaired assets measure, that is to say in the light of a total sum of aid of EUR 17 billion.

159 As a result of the errors made by the Commission, it is no longer possible for it to contend, as it does in recitals 106 and 141 in the preamble to the contested decision, that the aid in question constitutes a ‘significant aid amount’, ‘representing 5% of RWA’, on the basis of which the compensatory measures have been assessed.

160 In conclusion, since the first paragraph of Article 2 of the contested decision is unlawful in the light of Article 87(1) EC in that it classifies as State aid the restructuring aid which includes the additional aid of approximately EUR 2 billion referred to in recital 98 in the preamble to the contested decision, that illegality also necessarily results in the unlawfulness of the second paragraph of Article 2 of that decision and of Annex II thereto which is associated with it, in so far as the compatibility of the aid which is referred to in that second paragraph depends on an analysis and on commitments the content of which is to be assessed in the light of the restructuring aid defined by the first paragraph of Article 2 of that decision, which includes the additional aid.

161 Having regard to that conclusion and in the interests of the economy of procedure, there is no need for the Court to examine the arguments submitted by ING and the Commission concerning the second and third pleas in law submitted in Case T-33/10, which relate to a later stage of the analysis and assume that the restructuring aid referred to by Article 2 of the contested decision has been correctly classified, which is not so in the present case.

Costs

162 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party’s pleadings. Since the Commission has been unsuccessful in the present case, it should be ordered to pay the costs, as applied for by the Kingdom of the Netherlands, ING and DNB in their pleadings.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Joins Cases T-29/10 and T-33/10 for the purposes of the present judgment.**
- 2. Annuls the first paragraph of Article 2 of Commission decision 2010/608/EC of 18 November 2009 on State aid C 10/09 (ex N 138/09) implemented by the Netherlands for ING’s Illiquid Assets Back-up Facility and Restructuring Plan, the second paragraph of Article 2 of that decision and Annex II to that decision.**
- 3. Orders the European Commission to pay the costs.**

Azizi

Frimodt Nielsen

Kanninen

Delivered in open court in Luxembourg on 2 March 2012.

E. Coulon

Registrar

President

Table of contents

Background to the dispute	2
1. Aid measures granted to ING	2
2. Administrative procedure regarding those aid measures	3
3. Content of the contested decision	8
Procedure and forms of order sought by the parties	11
Law	13
A – Classification as additional aid	14
1. Arguments of the parties	14
a) The arguments concerning Article 87(1) EC	14
The effect of the assessment made in the contested decision on the amount of the capital injection aid	14
The need to examine all aspects of the capital injection	15
Comparison of the repayment terms in the light of the private investor principle	16
– The premiss of the Commission’s reasoning	16
– The advantage conferred on the State by the new terms	17
– Behaviour of a private investor	18
– The data produced by the Kingdom of the Netherlands	20
The alignment of the terms granted to AEGON and SNS Reaal	20
b) The arguments concerning the obligation of diligence and the duty to state reasons	21
2. Findings of the Court	22
a) Observations on the concept of aid and on the scope of judicial review	22
b) Assessment of the reasoning in the contested decision concerning the amendment to the repayment terms	25
Legal analysis of the amendment of the repayment terms	25
Factual analysis of the amendment to the repayment terms	29
Conclusion on the classification as additional aid	32
B – Consideration of the consequences of the defect affecting the grounds of the contested decision on its operative part	32

1. Lawfulness of the first paragraph of Article 2 of the contested decision	33
2. Lawfulness of the second paragraph of Article 2 of and Annex II to the contested decision	33
Costs	35